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THE LAW
OF
UNINCORPORATED
ASSOCIATIONS
AND SIMILAR RELATIONS

BY
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BOSTON
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PREFACE

THE development of the law of corporations was the overshadowing feature of legal history in this country in the last quarter of the nineteenth century. It was accompanied by an unreasoning public hostility to corporations which bore fruit in the imposition of taxes and regulations by Legislatures which in many cases have seriously impaired the efficiency of this form of organization for coöperative business enterprise. One of the most striking features of the recent decisions of the Courts is the evidence that business men are reverting to unincorporated associations to carry out their purposes. Owing to peculiar local restrictions on corporations these associations have been more largely used and more highly developed in Massachusetts than elsewhere. To them the lawyers of other states are now turning for relief. These associations are organized under the terms of elaborate trust deeds and resemble closely the important features of corporations. The law on many of the most important questions raised by these instruments is still in the making. Some attempt at classification seems urgently needed if only as a basis for criticism and future development.

Underwriting syndicates are another kind of unincorporated coöperative organization dealing with financial operations of vast importance. Among other associations not organized for profit, especial interest today attaches to stock exchanges, trade unions and

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religious associations. In view of the interest aroused in these subjects it has seemed desirable to prepare a text book covering the entire field of unincorporated associations.

No comprehensive classification of the whole subject has been made in recent years. Some aspects of it have been touched upon in treatises upon other subjects. Indeed it is surprising under how many unfamiliar titles the authorities have been concealed in the digests and encyclopædias. Though the law of associations has in recent years proved an alluring field for speculation by authorities upon jurisprudence, this book is intended primarily for the convenience of the practitioner. For that reason the familiar part of the law has been condensed and the citations distinguished by indicating some striking characteristic in the facts of each. Brief abstracts of the others are given in the notes. In an appendix are printed forms consisting mainly of the deeds of trust of business organizations that have been considered in the important recent decisions or have been used in practice. It is hoped that these will prove suggestive to attorneys desiring to prepare such papers.

The author desires to acknowledge his indebtedness to John L. Thorndike, Esq., of the Boston Bar, for important suggestions.

S. R. WRIGHTINGTON.

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UNINCORPORATED ASSOCIATIONS

CHAPTER I

INTRODUCTION

§ 1. Definition

THE term "association" has not acquired a technical legal meaning which can safely be stated in the form of a definition. In the philosophy of the law it has been used sometimes to describe all cohesive groups of individuals whether or not endowed by the State with the conception of artificial entity. Regardless of the theoretical soundness of this terminology,¹ in entitling a book devoted to unincorporated groups long usage seems to require the addition of the limiting participle to the word "association." The word "voluntary" which has been most often employed for this purpose seems inappropriate in this connection in modern Eng-

¹ "Philosophy may have gained by the attempts in recent years to look through fiction to the fact and to generalize corporations, partnerships and other groups into a single conception. But to generalize is to omit, and in this instance to omit one characteristic of the modern corporation as called into being under modern statutes that is most important in business and law. A leading purpose of such statutes and of those who act under them is to interpose a non-conductor through which in matters of contract it is impossible to see the men behind." HOLMES, J., in *Donnell v. Herring Co.*, 208 U. S. 267, 273, 52 L. ed. 481, 28 S. Ct. 288. See also *Merchants National Bank v. Wehrmann*, 202 U. S. 295, 300, 50 L. ed. 1036, 26 S. Ct. 613, and "The Law of Associations, Corporate and Unincorporate," Herbert A. Smith, Oxford, 1914.

lish, for incorporators act under no compulsion. Hence the words "unincorporated associations" will be used herein.

As used in statutes the word "associations" has been held to include both incorporated and unincorporated groups.² When used in statutes in connection with the word "company" the words have sometimes been held synonymous.³ In interpreting other statutes the word has been held to mean something different from a corporation⁴ and again something distinct from a partnership.⁵ Apart from interpretations of statutes not particularly concerned with this distinction most courts formerly held that in business enterprises there is no intermediate stage between partnership and corporation.⁶ In more recent cases a tendency seems

² *U. S. v. Trinidad Coal, etc. Co.*, 137 U. S. 160, 169, 34 L. ed. 640 11 S. Ct. 57.

³ *Lee Mut. F. Ins. Co. v. State*, 60 Miss. 395, 398.

⁴ *State v. Steele*, 37 Minn. 428, 430, 34 N. W. 903. See also *Adams Express Co. v. Schofield*, 111 Ky. 832, 836, 64 S. W. 903.

A statute providing for sale of pledged shares of corporations was held not to apply to shares of unincorporated associations (real estate trust). *Linnell v. Leon*, 206 Mass. 71, 91 N. E. 895.

⁵ *Laycock v. State*, 136 Ind. 217, 228, 36 N. E. 137; *Base Ball Assoc. v. Club*, 75 N. Y. S. 1076; *Richardson v. Harsha*, 22 Okla. 405, 420, 98 Pac. 897; *Osborne v. Holland*, 1 Tex. App. Civ. Cas., § 1087.

So in interpreting the words "unincorporated company" in the United States Bankruptcy Act it was held that an involuntary petition might be filed against a Lloyds Insurance Association as such. *Re Seaboard Fire Underwriters*, 137 Fed. 987 (D. C. — N. Y.). The same rule was applied to a real estate trust. *Re The Associated Trust*, 222 Fed. 1012 (D. C. — Mass.).

⁶ *People v. Rose*, 219 Ill. 46, 59, 76 N. E. 42; *Thomas v. Dakin*, 22 Wend. 9, 69; *Niagara County v. People*, 7 Hill 504, 507.

The rule that for purposes of jurisdiction of courts of the United States a suit by or against a corporation in its corporate name is conclusively presumed to be against citizens of the State creating the corporation is not applied to joint stock companies organized under the statute of New York. *Chapman v. Barney*, 129 U. S. 677, 682, 32 L. ed. 800, 9 S. Ct. 426; or limited partnership associations organized under the statute of Pennsylvania. *Great Southern Co. v. Jones*, 177 U. S. 449, 454; 44 L. ed. 842, 20 S. Ct. 690. See *post*, § 12, note 14.

discernible towards establishing such an intermediate organization.⁷ When associations have been regulated by statute, courts have had much difficulty in distinguishing them from corporations.⁸ The term has been applied to small as well as to large groups of individuals, but it is usually and most properly applied to many persons acting together through officers or agents in the prosecution of important enterprises.⁹

⁷ See § 12, note 5.

⁸ "Family" of Shakers apparently incorporated by peculiar statute. *Pease v. Pease*, 35 Conn. 131.

An association filing articles under a statute regulating voluntary associations became a corporation and could sue as such on a subscription contract. *Mullen v. Beach Grove Driving Park*, 64 Ind. 202, 206.

Indictment defective that alleged larceny from the American Express Company without alleging it was a corporation or an association formed under the statute making it so far an entity that it can hold property or alleging the names of partners. *People v. Brander*, 244 Ill. 26, 31, 91 N. E. 59.

Adams Express Company held to have enough of the qualities of a partnership to subject it to liability in New Jersey as an unincorporated association. *Saunders v. Adams Express Co.*, 71 N. J. L. 520, 58 Atl. 1101. See *U. S. v. Adams Express Co.*, 229 U. S. 381, 390, 57 L. ed. 1237, 33 S. Ct. 878.

"A corporation has artificial entity; a joint stock company, though it has some of the rights of corporations, cannot exist as an entity distinct from its members." "Even if, unlike a partnership which it really is, it can be said to exist as an artificial being, it owes its existence not to the State but to the contract of its members and may be said to exist wherever it does business or owns property. In that sense the analogy to a corporation is to one organized under the laws of two or more States." *Re Willmer's Estate*, 138 N. Y. S. 649, 153 App. Div. 804.

"It is a *quasi* corporation. Its members are not partners." *Storebe v. Albert*, 1 N. Y. City Court, 376.

"A partnership with some of the powers of a corporation." *Van Hernan v. Bleistein*, 102 N. Y. 360, 7 N. E. 537; *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96.

Shares in a joint stock association owned by a deceased resident of New York are personal property and taxed at full value though part of the assets of the association was real estate which if it had descended to the heirs of the deceased would have been exempt. *Re Jones*, 172 N. Y. 575, 65 N. E. 570. See § 9, note 2.

⁹ *Mills v. State*, 23 Tex. 295, 304.

One reason for the uncertainty of the courts is the fact that the term is applicable to two very different sorts of groups as will appear from the following attempt at classification.

§ 2. Classification

Individuals acting in groups without a charter of incorporation from the State may be classified as those whose purpose is pecuniary profit and those whose purpose is not pecuniary profit. They may also be divided into those groups in which there is the element of association or coöperation and those in which the units in the main act individually. These two classifications are not mutually exclusive, nor are their characteristics sharply defined. Indeed, considering the early period at which these questions began to come before the courts, the rules of law applicable to all such groups are still surprisingly vague. Classification along the lines above indicated will aid, however, in systematizing the law. The following is an attempt at such classification:

I

Groups classified according to pecuniary purpose.

A. Those whose object is profit.

1. Associations for Profit or Partnerships.

(a) Informal Associations.

(b) Mining Partnerships.

(c) Statutory Joint Stock Associations.

(d) Defective Incorporations (in most States).

(e) Formal Associations.

2. Trusts.

3. Unassociated Groups.

- (a) Dealers through a Common Agent.
- (b) Syndicates Underwriting Securities (usually).
- (c) Lloyd's Insurers (usually).
- (d) Defective Incorporations (in some States).
- (e) Tenants in Common.

B. Non-Profit Associations.

- 1. Social Clubs.
- 2. Fraternal Orders.
- 3. Benefit Societies.
- 4. Temporary Local Organizations.
- 5. Religious Societies.
- 6. Professional Societies.
- 7. Farmers' Telephone Lines.
- 8. Socialistic Communities.
- 9. Stock Exchanges.
- 10. Trade Unions and Employers' Associations.

II

Groups classified according to cohesion.

C. Those which have the element of association.

No. 1 of Group A, *supra*, and all of B.

D. Those without an element of association.

No. 2 and No. 3 of Group A, *supra*.

§ 3. Law Applicable

The problem with reference to all of these groups is the application to them of principles of law originally developed with respect to relations between two or three individuals, in the first class the law of partnership, in the second class the law of trusts, in the

remaining classes the law of agency. Corporations, having been recognized from the start as possessing individuality under the fiction of artificial personality, were able to develop a law very much their own. Unincorporated groups have developed hampered by rules of law which seem logically applicable, yet rules which had been formulated with slight regard to the problems presented by individuals in the aggregate. The ingenuity of modern draftsmen has done much to relieve unincorporated groups of legal restrictions hindering their growth, but these documents themselves have created new conundrums as yet unanswered.

As previously stated a distinct tendency is noticeable both in statute and decision to treat associations for profit as organizations intermediate between partnerships and corporations. Such classification will tend to develop for them a law of their own. Though to some extent these dicta have been due to loose reasoning, statutory recognition of the situation gives to the more recent of them a position of authority. The importance of the interests involved in these modern cases seems to justify fully the classification which we see developing.

Another attempt by the courts, encouraged by the digesters, to create a new legal relation is the use in recent cases of the term "joint adventure." In almost every instance where this term has been applied the relation in fact was that of partnership and the court has applied the ordinary rules of partnership called for by the facts though using this new term as though the relation was not that of partnership. So far as the courts seem to have had a distinction in mind they have applied this term to partnerships formed to engage in a single transaction instead of in a series of

transactions such as constitute the business of an ordinary commercial partnership. These cases have usually involved only a few individuals and so do not particularly concern this treatise. In an important recent decision, however,¹ the term has been applied to a syndicate of numerous members of the sort that has frequently been held a partnership. In the case in question the syndicate was held not a partnership but a "joint venture" and the court expressed an inclination not to apply to it all the ordinary rules of partnership. It would seem that the court had in mind either the sort of relation which is herein described as an Unassociated Group or what was really a Trust.²

§ 4. Modern Tendencies

One of the surprises of recent law has been the reflection in the decisions of the courts of a revival of interest among business men in unincorporated associations. Taxation and inquisitorial legislation affecting corporations has driven many concerns to what might seem a more primitive form of business organization. In certain States, notably Massachusetts, where local legislation of long standing had forced such developments earlier than elsewhere, these associations have been developed to a high degree of effectiveness. The attention attracted by their success foreshadows a similar tendency in other States. The newest law to-day concerns the application of old principles to the new problems created by associations for profit. It seems well, therefore, to begin by a consideration of the nature of this form of group, its distinction from other similar groups and the law applicable to it.

¹ *Jones v. Gould*, 209 N. Y. 419, 424, 426, 103 N. E. 720.

² See § 50, note 3.

CHAPTER II

ASSOCIATIONS FOR PROFIT

§ 5. Early Companies

ASSOCIATIONS for profit or partnerships take different forms according as they have developed from different sources. One of the earliest forms was the large trading partnership with transferable shares which was the direct progenitor of the modern business corporation.¹ These grew out of small partnerships and were treated as partnerships from the start. The consequences to the holders of these shares of the failure of speculative "bubbles" and the subsequent restrictive legislation² led for a time to their abandonment and caused the substitution of corporations.

§ 6. Informal Associations for Profit

A primitive kind of association for profit is that developed from the social club, the somewhat informal organization with constitution and by-laws setting forth the mutual rights and obligations of the members.¹ What makes such groups partnerships, unlike their progenitor, the social club, is their purpose, viz., the

¹ "Where men associate themselves together and conduct a general business under a common name and do not incorporate the association under the laws of the State, they may be deemed partners." *Love v. Blair*, 72 Ind. 281, 282.

² In England, the so-called "Bubble Act." 6 Geo. I c. 18.

¹ *Tyrrell v. Washburn*, 6 Allen 466; *Ashley v. Dowling*, 203 Mass. 311, 317, 89 N. E. 434.

pecuniary gain of the members in some sort of business.²

During the middle of the last century a craze seems to have swept the United States for the organization of coöperative stores, chiefly among farmers wholly unacquainted with store-keeping. The vicissitudes of these organizations furnish many decisions on the application of the law of partnership to associations.³ Communistic societies are properly held non-profit associations, but in one case the Supreme Court of the United States referred to one as a partnership.⁴ Farmers' telephone lines are a recent variety of coöperative organization, usually of the most informal character. They are usually and, it is submitted, properly held non-profit associations, but one such association was held not a commercial partnership, but a non-trading partnership.⁵ The law relating to non-profit associations is discussed hereafter in Chapter V.

² *Regina v. Robson*, L. R. 16 Q. B. D. 137.

³ "Their constitution is quite full and minute in establishing rules fit for a debating society, but wholly silent upon points the most vital to their pecuniary welfare." *Henry v. Jackson*, 37 Vt. 431.

A coöperative store was held not a partnership, and liability of members was held to depend on the principle of agency. *Davison v. Holden*, 55 Conn. 103, 112, 10 Atl. 515.

What seems to have been a coöperative store was held not a partnership "as between themselves" because they understood their liability was limited to their subscriptions. *McDonald v. Fleming*, 178 Mich. 206, 144 N. W. 519.

Evidence held insufficient to show that a Farmers' League owned a coöperative cash store. *Willoughby v. Hildreth*, 182 Mo. App. 80, 167 S. W. 639.

⁴ *Goesele v. Bimeler*, 14 How. 589, 607. See *contra*, *Teed v. Parsons*, 202 Ill. 455, 460, 66 N. E. 1044. See § 54, note 7.

⁵ In which partners have no implied power to borrow on the credit of the firm. The court, however, proves the unsoundness of its own reasoning by treating social clubs and lodges as in this same class. *Schumaker v. Sumner Tel. Co.*, 161 Ia. 326, 142 N. W. 1034. See § 54, note 8.

§ 7. Mining Partnerships

One form of partnership which has seldom been recognized as a true association, but treated rather as an isolated exception to the rules of ordinary partnership, is the so-called "mining partnership."¹ Companies formed to operate mines appear in English cases in the early part of the last century² before the discovery of the mineral wealth in our West. These companies, like most joint stock companies of the day, had transferable shares, though they were not always represented in formal organizations with certificates of stock. From the fact that these shares were fully transferable, that is, that the rule of ordinary partnerships known as *delectus personae* did not apply, certain other exceptions to the usual rules of partnership were also established at an early date.³ It would seem more likely that these doctrines were applicable to all associations than that they were peculiar to the law of mines. They were taken up, however, in our western States when their courts began to decide mining litigation and rapidly developed into an arbitrary exception to the law of ordinary partnership and not limited to true associations. The doctrine has been applied to oil drilling proprietors⁴ and to some extent to proprietors of irrigation ditches.⁵ This mining partnership law soon became crystallized in the codes. Attention will be called hereafter to the relation this law bears to that of other associations for profit.

¹ See § 17, note 5.

² See § 26, note 4.

³ See § 22, notes 2 and 6, and § 26, note 6.

⁴ See § 17, note 5.

⁵ See § 17, note 7.

§ 8. Syndicates

Syndicates and "pools," formed sometimes under elaborate agreements, sometimes in the most informal way, usually for the purpose of speculation in securities or commodities, are more modern organizations that have sometimes been deemed partnerships¹ and sometimes merely joint contractors or un-

¹ On a bill to cancel a conveyance for fraud. Held: "The Hogg-Swayne Syndicate was a private association whose members had negotiable shares and interests varying as sales and purchases of respective interests took place; but as a partnership it bought and sold the Snow title and all the members thereof, defendants herein, are liable as partners for the proceeds of the Snow interest coming into the hands of the Syndicate." One of the defendants bought in after the contract of purchase now rescinded. *Snow v. Hazelwood*, 179 Fed. 182, 185 (C. C. A. — Tex.).

Held on the evidence that a note signed by syndicate managers was the note of the syndicate and not their personal note and that it had been paid by plaintiff becoming a subscriber to the syndicate to that extent. This was a syndicate to buy securities of two railroads and combine them and issue new securities to members of the syndicate. *Continental Nat. Bank v. Heilman*, 81 Fed. 36, 41.

"Now a syndicate, according to the undisputed evidence, is an association of individuals formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested. It is as respects the persons composing it a partnership and in so far as these same persons are concerned the legal obligations assumed by them are as between themselves substantially the same as those which the law imposes on the members of an ordinary co-partnership." *Hambleton v. Rhind*, 84 Md. 456, 487.

A syndicate agreement for the purchase, sale and ultimate division of certain stock was settled by a distribution of the stock. One of the signers now seeks to reopen the settlement on the ground that the managers violated their duty in operating on their own account. Held: Cannot reopen the account with the other partners for fault of the managers. His right is against the managers. *Boody v. Drew*, 46 How. Pr. 459.

The famous partnership case of *Pooley v. Driver*, 5 Ch. D. 458, really involved an unincorporated association. A statute had been passed called Lord Bovill's Act, providing that one who loaned money to a firm in consideration of a share in the profits should not be deemed a partner. The owners of a business made agreements with a group of investors purporting to provide for a series of separate loans to the firm to take advantage of this statute. The agreements provided that the firm should use the money loaned in the business and not draw it

associated groups.² In their most artistic form they are probably really trusts. No general rule can be laid down, for the forms taken by syndicates are varied and the legal relation of the members depends on the facts of the particular case. Similar to these syndicates are the organizations of individual insurance underwriters usually called "Lloyd's." When skilfully organized these are not partnerships and are therefore discussed more fully hereafter.³ In some instances, however, they are formed under articles of association giving the associates considerable powers of control over the management of the business by the attorney and in actions other than those upon their policies of insurance they have therefore been properly held partnerships.⁴

§ 9. Statutory Joint Stock Associations

In some States elaborate forms of associations for profit are organized under statutes which make them almost, if not quite, corporations. In New York, Pennsylvania and Michigan such statutory organizations have been largely employed in business enterprises. In New York in particular, this form of organization, there called a joint stock association,¹ proved so satis-

out. The court held that it was really a device to avoid liability and not a real loan and that the contributors were partners.

A combination of more than twenty persons formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest with a bonus was held an association for the acquisition of gain and so illegal because not registered. *Sykes v. Beedon*, L. R. 11 Ch. D. 170, 189.

² See § 50.

³ See § 49.

⁴ See § 49.

¹ This term is one of the earliest applied to business associations with transferable shares and for a time continued to be used after these associations began to be incorporated. "Joint stock company" in early Massachusetts statutes was equivalent to corporation or-

factory that all the great express companies were organized under it in preference to the general law authorizing incorporation.

The New York judges themselves have been uncertain as to the proper classification of these associations, but the later decisions seem to hold that they are not corporations and are therefore partnerships.² When

organized under general laws. *Attorney General v. Mercantile Co.*, 121 Mass. 524.

² Issue whether a New York statute taxing corporations applied to joint stock companies organized under statute. Held: Original statute allowing suit against and by president or the association expressly declared they were not corporations and though recent statutes have given them nearly all the attributes of corporations they have not obliterated that distinction. The distinction is that the creation of a corporation merges in it the individual rights and liabilities of the members, but the organization of a joint stock company leaves those in full force (p. 284). "We can say as we did say in *Van Aernam v. Bleistein*, 102 N. Y. 360, 7 N. E. 537, that a joint stock company is a partnership with some of the powers of a corporation" (p. 287). *People ex rel. Winchester v. Coleman*, 133 N. Y. 279, 31 N. E. 96.

Shares in a joint stock association owned by a deceased resident of New York are personal property and taxed at full value, though part of the assets of the association were real estate which if it had descended to the heirs of the deceased would have been exempt. *Re Jones*, 172 N. Y. 575, 65 N. E. 570.

But see opinion of O'Brien, J., in *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108.

Statute authorizing action against president of unincorporated associations. President was defendant and jurisdiction determined by his residence. *Adams Express Company* is a partnership (citing cases). *Brooks v. Dinsmore*, 15 Daly (N. Y.) 428, 8 N. Y. S. 103, 28 N. Y. St. 421, 18 N. Y. Civ. Proc. 98. *Acc. Bacon v. Dinsmore*, 42 How. Pr. (N. Y.) 368.

A voluntary association under New York statutes is a *quasi* corporation. Members are not partners. It may be sued by a member and it may sue a member. Hence president may sue treasurer for its funds. *Strebe v. Albert*, 1 N. Y. City Ct. 376.

The decedent, a resident of New Jersey, owned shares in a New York joint stock association. Held: They are liable for a transfer tax on the proportion of their value which the property within the State bore to the entire property of the association. "The distinction between a corporation and a joint stock association, as concerns the point for decision, is that a corporation is an artificial entity existing in contemplation of law in the State of its creation. It can have no existence elsewhere and is recognized in other jurisdictions only by

these associations have come before the courts in other jurisdictions divergence of opinion has resulted as to

comity. It is a citizen within the meaning of certain provisions of the Federal Constitution. Whereas a joint stock association, though it have some of the rights of a corporation and may sue and be sued in the name of its president, still does not exist as an entity distinct from its members. . . . Even if, unlike a partnership, which it really is, it can be said to exist as an artificial being, it owes its existence not to the State but to the contract of its members and may therefore be said to exist wherever it does business or owns property. In that sense its analogy to a corporation is to one organized under the laws of two or more States." *Re Willmer's Estate*, 138 N. Y. S. 649, 153 App. Div. 804.

Shareholders in a joint stock association whose articles give the directors power to dissolve it cannot object to such dissolution and sale of its assets on the theory that it is a corporation because *People v. Coleman* decided it was not. *Francis v. Taylor*, 65 N. Y. S. 28, 52 App. Div. 631.

An officer of a joint stock company cannot refuse to produce documents in his custody when subpoenaed. It is not a corporation. *Woods v. De Figanieri*, 24 N. Y. Super. Ct. 659.

Many of the earlier cases, however, treated them like corporations. *Sandford v. Supervisors*, 15 How. Pr. 172.

In a controversy between a shareholder and the company it is not to be considered a partner, but the controversy must be decided on the analogy of corporations. *Waterbury v. Merchants Co.*, 50 Barb. 157.

An action on a liability of the company may be maintained by a shareholder. For purposes of action the officer sued is a corporation sole. *Westcott v. Fargo*, 61 N. Y. 542.

They are taxable under the act taxing corporations. They must be deemed to be incorporated. *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046.

It is, like a corporation, a citizen of New York for purposes of removal to United States courts. *Fargo v. McVicar*, 55 Barb. 437; *Maltz v. American Express Co.*, 1 Flip. 611 (C. C. — Mich.); *Fargo v. L. N. A., etc. Co.*, 6 Fed. 787 (C. C. — Ind.).

Whether or not a corporation, the right to sue the shareholders as individuals is preserved. *Moore v. Brink*, 4 Hun 402, 404.

Under a statute authorizing an executor to deliver property in specie instead of selling it, shares in a joint stock company may be delivered. The interest of the testator was like that of a shareholder in a corporation. He could dispose of the shares by will in spite of a provision in the articles requiring offer to the company before sale. *Lane v. Albertson*, 79 N. Y. S. 947, 953, 78 App. Div. 607.

Shareholders in a joint stock association have the same rights as stockholders in a corporation to examine the books, but a prerequisite to granting mandamus for that purpose is that the officers after a reasonable time refuse. *Re Hatt*, 108 N. Y. S. 468. See *U. S. v. Adams Express Co.*, 229 U. S. 381, 390, 57 L. ed. 1237; 33 S. Ct. 878.

their status.³ The United States Supreme Court has held that they are not corporations within the rules

³ A bill to enjoin violation of a patent by a New York joint stock association may be brought against shareholders individually as partners. *Tyler v. Galloway*, 13 Fed. 477 (C. C. — N. Y.). But see *Raymond v. Colton*, 104 Fed. 219, 224 (C. C. A. — N. Y.).

The following cases applied the analogy of corporations. Shares in the Adams Express Company are to be treated as shares in a corporation for the purpose of apportioning dividends between life tenant and remainderman. A distribution of bonds was held not in substance a cash dividend. *Bishop v. Bishop*, 81 Conn. 509, 529, 71 Atl. 583. *Acc. D'Ooge v. Leeds*, 176 Mass. 558, 563, 57 N. E. 1025.

The common law rule as to service of process on a corporation applied to service on a New York joint stock company and service of a mandamus by order of court on the local express agent was held valid. *State v. Adams Express Co.*, 66 Minn. 271, 68 N. W. 1085. *Acc. Adams Express Co. v. Schofield*, 111 Ky. 833, 64 S. W. 903.

In an action of tort against a New York joint stock association sued in the name of its treasurer under the New York statute for negligence by an express driver, held that the organization is a corporation under the law of New York suable this way and so the New Jersey statute providing for suit against associations in their association name did not apply. *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940. See *Tide Water Co. v. State Board of Assessors*, 57 N. J. L. 516, 31 Atl. 220.

On the issue whether a certain association was a joint stock company or a corporation, its classification by the statutes of New York where it was created, as a joint stock company, is not conclusive. *State v. U. S. Express Co.*, 1 Ohio N. P. 259.

President of a New York joint stock association may sue on behalf of the association for money stolen because the partners are too numerous to join. Under code which merges equity and law this method can be used even in actions not of an equitable nature. *Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. 735.

A New York joint stock association may be served with process in Ohio like a corporation. *People v. Wemple* cited as authority for its being substantially a corporation. *Platt v. Colvin* distinguished on the ground that the issue was not directly presented. *Express Co. v. State*, 55 Ohio St. 69, 44 N. E. 506.

In other States they have been held not corporations. A New York joint stock association cannot be indicted for doing business in the State without filing the papers required by statute of foreign corporations. *Comm. v. Adams Express Co.*, 123 Ky. 720, 97 S. W. 386. But see *Adams Express Co. v. Schofield*, 111 Ky. 833, 64 S. W. 903.

In Massachusetts they have been held partnerships. *Taft v. Ward*, 106 Mass. 518; *Bodwell v. Eastman*, 106 Mass. 525; *Gott v. Dinsmore*, 111 Mass. 45.

It has been held in Massachusetts, however, that certain "joint stock associations," so-called, organized under the laws of other States as something distinct from corporations may have so many of the elements of corporations that they will be deemed to be such in apply-

relating to jurisdiction by reason of diverse citizenship of the parties.⁴ Under another New York statute, which applies also to non-profit associations,⁵ associations of seven or more members sue and are sued in the name of its president or treasurer.⁶ In an action against

ing Massachusetts statutes regulating transaction of business by foreign corporations. "When by legislative authority or sanction an association is formed capable of acting independently of the rules and principles that govern a simple partnership, it is so far clothed with corporate powers that it may be treated for the purposes of taxation as an artificial body, and become subject as such to the jurisdiction of the government under which it undertakes to act in its associated capacity." *Oliver v. Liverpool & London Co.*, 100 Mass. 531, 540. As to the real effect of this case, see *Liverpool Ins. Co. v. Mass.*, 10 Wall. 566; *Edwards v. Warren, etc.*, Works, 168 Mass. 564, 567, 47 N. E. 502.

Adams Express Company not being a corporation cannot sue for damages to its property in the name of the association or in the name of its officers as trustees. *Weir v. Met. St. Ry.*, 126 Mo. App. 471, 103 S. W. 583.

An action against the Adams Express Company describing it not as a legal entity but as a joint stock association organized and existing under the laws of New York must be dismissed, for it names no party defendant. *Met. St. Ry. v. Adams Express Co.*, 130 S. W. 101.

⁴ In an action by the president of the United States Express Company in the Illinois United States Court. Held: "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is that the United States Express Company is a joint stock company organized under a law of the State of New York and is a citizen of that State. But the express company cannot be a citizen of New York within the meaning of the statutes regulating jurisdiction unless it is a corporation. In fact the allegation is that it is not a corporation, but a joint stock company — that is a mere partnership. And although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power by that name to sue in a federal court." The record does not show that the members of the company are citizens of some State other than Illinois. *Chapman v. Barney*, 129 U. S. 677, 682, 32 L. ed. 800, 9 S. Ct. 426.

⁵ See § 70, note 21.

⁶ *Robbins v. Wells*, 26 How. Pr. 15.

Failure to name as defendants the officers or members of a joint stock association is waived by a general appearance of the association. *Brooks v. Farmers' Ass'n*, 21 Weekly Dig. 58.

It may be sued for libel. *Van Aernam v. Bleistein*, 102 N. Y. 355, 7 N. E. 537.

It is a sufficient answer to an action against an officer of a joint stock association under the statute to aver that it has gone out of existence. *Peckner v. Webb*, 71 N. Y. S. 768, 35 Misc. 291.

a joint stock association the funds of the association must be exhausted before suing the individual members.⁷ After the creditor has obtained judgment against the corporation and it is unsatisfied he may sue the individual members as partners. He sues them not on the judgment but on the original cause of action.⁸ Under this statute the association through its officer may sue and be sued by another member in an action at law.⁹ A shareholder may bring suit for a dissolution of the association,¹⁰ and is entitled to a sale of the assets as is a member of an ordinary partnership.¹¹ Other de-

⁷ *Robbins v. Wells*, 26 How. Pr. 15.

⁸ *Witherhead v. Allen*, 4 Abb. Dec. 628, 632 (N. Y.).

Though a creditor must get judgment against the association before suing individual members (under New York statute) yet the judgment is not conclusive as against the individual members. *Allen v. Clark*, 65 Barb. 563.

⁹ A president of an unincorporated joint stock company suing for it under the statute can sue at law a shareholder to recover an assessment where the articles of association provide for it. *Bray v. Farwell*, 3 Lans. 495, 508.

A member of a joint stock association may sue it in the names of its officers under the statute. *Sanders v. Edling*, 13 Daly (N. Y.) 238; *Fritz v. Muck*, 62 How. Pr. 69; *Westcott v. Fargo*, 61 N. Y. 542, 550.

A member of a stock exchange cannot sue the president under the statute for an injunction to prevent his suspension. The statute was intended to apply to suits having in view a remedy against the property of the association. As this was a voluntary association and there was nothing to show that the proceedings were fraudulent or corrupt or the result of a conspiracy, there is no case for equity jurisdiction. *Rorke v. Russell*, 2 Lans. 244, 247.

A joint stock company may be sued by a member for nuisance. *Saltsman v. Shultz*, 14 Hun 256.

¹⁰ A shareholder in a joint stock association, being personally liable for its debts like a partner, is entitled to "institute an action for its dissolution whenever a suitable occasion arises rendering it legitimately desirable to wind up its affairs." *Snyder v. Lindsey*, 36 N. Y. S. 1037.

¹¹ On a consolidation of joint stock companies a dissentient shareholder is not bound to accept valuation of his shares fixed by the majority but like any partner is entitled to a sale. *McVicker v. Ross*, 55 Barb. 247.

A consolidation of joint stock companies in which stock in a corporation was given for assets of the associations. On a shareholder's bill against the trustees. Held: Duty of trustees after dissolution is to

cisions relating to these associations apply the analogies of the law of corporations.¹²

sell the assets and divide the proceeds among the shareholders. Minority cannot be forced to take stock in the corporation. If the trustees fail to convert into cash, the shareholders may sue them and recover either the proceeds or the value of their shares. Receiver of remaining assets appointed. *Frothingham v. Barney*, 6 Hun 366, 372.

¹² Plaintiff and defendant held all but five shares in a joint stock company. The other shares were held by directors. Defendant agreed to buy plaintiff's stock in consideration of his resignation and that of his relatives from office and delivery of one-quarter of the goods on hand. Resignations delivered later. Action for goods. Held: Contract void under statute of frauds (p. 225, one judge dissenting). Contract not void as against public policy because practically entire stock ownership participated so not an illegal contract to resign as director or misappropriate goods of the association (p. 226, one judge dissenting). "In fact and in law there was no partnership between the parties and there were no firm assets, and the view which they took of their relations could not change their legal aspect. All that the plaintiff had to sell and all that the defendant could buy were the plaintiff's shares in the association" (p. 224). *Raymond v. Colton*, 104 Fed. 219 (C. C. A. — N. Y.).

A shareholder's petition to dissolve a joint stock association on the ground of fraud was held on the evidence not sustained. The association was not bound to declare dividends of profits (p. 217). Though persistent undervaluation in annual inventories might tend to depreciate plaintiff's stock and might be sufficient, the evidence did not establish it (p. 214). *Colton v. Raymond*, 85 N. Y. S. 210, aff'd 100 N. Y. S. 1111, 114 App. Div. 911.

Action to restrain officers of joint stock association from consolidating with another express company. They had had the by-laws amended so as to allow it to be done without consent of majority of shares. Held: The power to amend the by-laws did not authorize such an act which was beyond the scope of the enterprise. All must consent. All shareholders need not be joined. *Blatchford v. Ross*, 54 Barb. 42.

Bill by shareholders in the United States Express Company alleging fraud and praying that directors be obliged to call meeting of stockholders to elect directors. Articles named the original directors and provided that they might fill vacancies and that on petition of two-thirds of stock directors should call a meeting for removal of a director. No provision requiring calling of other meetings. In fact none ever held and present directors were all elected by the board. Held: In fact no fraud proved. Not entitled to decree for calling of meeting, for the articles of agreement are valid and binding at common law regardless of statute. "The United States Express Company was thereby constituted a legal entity with the right of existence to such time as it might see fit to extend the same." It is legal to provide for stock in such associations with limited voting rights. Dissent by one judge who held that the statute regulating such associations and the articles apparently drawn under it really contemplated some election of

In Pennsylvania, under the statute authorizing limited partnerships, associations have been organized and have assumed considerable commercial importance. They are deemed to be partnerships and not corporations,¹³ though the liability of members is as limited as ordinarily in corporations and they have other attributes of corporations.¹⁴ In the Federal Courts they

directors and that the plaintiff should have his decree. *Spraker v. Platt*, 143 N. Y. S. 440, 158 App. Div. 377.

Under statute of 1849 there need be no subscription in writing by the members. *National Bank v. Van Derwerker*, 74 N. Y. 234.

President of a joint stock association had power to mortgage its property to pay its debts (where a similar mortgage had been expressly authorized by stockholders and directors). *Nelson v. Drake*, 14 Hun 465, 470.

¹³ "A partnership association, commonly but inaccurately called a joint stock company, is the creation of the statutes and while it is assimilated in some respects to a corporation it is nevertheless essentially a partnership." By statute a purchaser of shares may demand an election to membership and if not granted within a reasonable time may demand an appraisalment and payment for his shares. When shares are purchased at different times the election or appraisalment must be as to all he holds at the time of demand. More than two months not unreasonable where six hundred members scattered over four States and no meeting for eight months. Method of appraisalment considered. *Carter v. Producers Oil Co.*, 200 Pa. St. 579, 585, 50 Atl. 167.

Companies organized under the Pennsylvania Act of 1874 simply limited partnerships. *Githens v. Grocery Co.*, 2 Del. Co. Ct. 452; *Lennig v. Penn. Morocco Co.*, 16 Weekly N. C. 114.

Quasi-corporations de facto. *Eliot v. Hinrod*, 108 Pa. St. 569; *Briar Hill Co. v. Atlas Works*, 146 Pa. St. 290, 23 Atl. 326.

Limited partnership associations "are in effect corporations or *quasi*-corporations. They are creatures of the law and by its express provisions they may be dissolved and thus cease to exist." Dissolution five years before by decree of court is sufficient plea in abatement to writ served on its secretary. *Billington v. Gauthier Co.*, 9 Atl. 35 (Pa.).

¹⁴ Members of a limited partnership association are not personally liable for torts of its agents unless they personally authorized or ratified them. Such association has some of the attributes of a corporation. "Unlike an ordinary partnership and like a corporation it is an artificial person and survives the death of a member or a sale of his interest." *Whitney v. Backus*, 149 Pa. St. 29, 34, 24 Atl. 51.

Shareholders in a limited partnership association after judgment against the association unsatisfied must be personally summoned in the proceeding to establish their individual liability for unpaid sub-

are also held partnerships.¹⁵ Courts have usually required strict compliance with the statutes authorizing limited partnerships if the members are to obtain its benefits and be relieved of the unlimited liability for firm debts that attaches to an ordinary partner. The Pennsylvania courts have been equally strict with these associations.¹⁶ One striking provision of the

scriptions and their accounts with the association settled. *Lauder v. Tillia*, 117 Pa. St. 304, 11 Atl. 86.

¹⁵ A Pennsylvania limited partnership association is not a corporation and not entitled to sue as a citizen of Pennsylvania in the United States Court. *Imperial Brewing Co. v. Wyman*, 38 Fed. 574, 579.

¹⁶ False statements in certificates make shareholders liable as general partners. *Van Horn v. Corcoran*, 127 Pa. St. 255, 18 Atl. 16.

Insufficient statements, i.e., not specific enough, have the same effect. *Gearing v. Carroll*, 151 Pa. St. 79, 24 Atl. 1045; *Haslet v. Kent*, 160 Pa. St. 85, 28 Atl. 501.

A statement in the certificate of limited partnership filed under the Pennsylvania Act of 1874 stated that certain shares were paid for by a right of way. In fact the right of way had not yet been acquired. Held: Shareholders liable as general partners. Appeal of *Hite Natural Gas Co.*, 118 Pa. St. 436, 12 Atl. 267.

But a statement that the capital was paid three-fourths in cash was complied with though the payments were not by all shareholders proportionately. *Lauder v. Logan*, 123 Pa. St. 34, 16 Atl. 44.

Lumping together separate tracts of land did not invalidate certificates. *Lafin Co. v. Steytler*, 146 Pa. St. 434, 23 Atl. 215; *Cock v. Bailey*, 146 Pa. St. 328, 23 Atl. 370.

A limited partnership association certificate stating the capital and that it was to be paid forthwith was filed, but the capital was never paid in. The statute fixed no time for payment but contemplated payment by instalments. Held: Statute not complied with where they start business with none paid in and the members are liable as general partners. *Hill v. Stettler*, 127 Pa. St. 145, 13 Atl. 306.

Strict compliance with the statute is necessary. Good faith of defendants or actual knowledge of plaintiffs is immaterial. A failure to include a detailed description of the property contributed as capital made them liable as general partners. *Sheble v. Strong*, 128 Pa. St. 315, 18 Atl. 397.

Capital may be paid in patent rights. In the absence of fraud, an excessive valuation does not invalidate the organization. *Rehfuß v. Moore*, 134 Pa. St. 462, 19 Atl. 756.

Withdrawal of capital from the bank where deposited before the organization is completed, but not from the funds of the association, does not make the organization invalid. *Masters v. Lander*, 131 Pa. St. 195, 18 Atl. 872.

Failure to pay off the mortgage as his contribution to the capital

Pennsylvania statute is that which exempts the association from liability on any contract involving over five hundred dollars unless it is signed by two of the managers.¹⁷ The association is named as

made the subscriber liable to creditors for the balance of his subscription. *Cox v. Watts Co.*, 157 Pa. St. 93, 27 Atl. 687.

If the plaintiff advised and assisted in the organization of a limited partnership association and took its bonds for indebtedness to him, he cannot later contend that the organization was defective and that the members are liable as general partners. *Alleghany Banks v. Bailey*, 147 Pa. St. 111, 116, 23 Atl. 439.

One of the three shareholders of a limited partnership association may transfer all his shares immediately after organization without impairing its validity. *Re Globe Refining Co.*, 151 Pa. St. 558, 25 Atl. 128.

The method of dissolution provided by statute must be followed if the partners are to escape unlimited liability. Hence while equity will wind it up as to six months' business continued after the termination of the original five-year limit just as it would on petition of a minority proving fraud or waste or insolvency, as to the business conducted under the old partnership during the five-year term a separate liquidation by the trustee must be had. *Tindel v. Park*, 154 Pa. St. 36, 42, 26 Atl. 300.

Members of a limited stock company are not liable as general partners for goods ordered on approval in the name of the company before the recording of the articles of association where recorded before the approval. *Hinds v. Battin*, 163 Pa. St. 487, 30 Atl. 164.

The schedule of personal property subscribed in lieu of cash by members of a partnership association is sufficient if it is elaborate and truthful and the result of an honest effort to comply with the statute and is such as to enable parties dealing with the association to readily ascertain the kind, amount and value of property contributed. *Robbins Co. v. Weber*, 172 Pa. St. 635, 34 Atl. 116.

Members of one limited partnership association formed another and certified as its assets property which was the property of the old association. Held: Title to the property not absolute unless it was a surplus after payment of debts or creditors consented. Hence certificate not correct and members liable as general partners. *Lee v. Burnley*, 195 Pa. St. 58, 45 Atl. 668.

Members of a limited partnership association are liable as general partners when the statement filed is materially false and no subscription book has been kept. In such a case, the funds assigned for creditors are not liable for judgments in favor of the partners. Appeal of *Gebhart*, 4 Pa. Super. Ct. 106.

The use of the abbreviation "Ltd." instead of "Limited" in the name as required by statute is not such a violation of the statute as to impose the penalty. *Abington Co. v. Reynolds*, 24 Pa. Super. Ct. 632.

¹⁷ Under Pennsylvania statute of limited partnership associations

the party to an action.¹⁸ The provisions relating to shares resemble the law of corporations.¹⁹ The

an obligation over \$500 not signed by two managers is enforceable only against the person incurring the debt. Held: A draft on such an association accepted by only one manager and discounted by plaintiff bank was not enforceable against him. Bank bound to know it required two. If defendant signed expecting another to sign he is not bound. *Mercantile Bank v. Lauth*, 143 Pa. St. 53, 21 Atl. 1017.

A limited partnership association is not liable on a contract for more than \$500 unless signed by at least two managers. Creditor who has one signed by one only cannot on ground of mistake bring a bill to reform and compel execution by two. *Andrews Bros. Co. v. Youngstown Coke Co.*, 39 Fed. 353 (C. C. — Pa.).

A member of a limited partnership association has not the power of an ordinary partner to bind the association by a contract to sell and third parties are bound to know that such authority is vested in the managers. Also of the \$500 limit. *Pittsburg Co. v. Reese*, 118 Pa. St. 355, 12 Atl. 362. Acc. on latter point, *Walker v. Keystone Co.*, 131 Pa. St. 546, 20 Atl. 309.

A limited partnership association may adopt and sue on a contract not executed according to the statutory formulation when it has made or tendered full performance. *Park Co. v. Kelly Co.*, 49 Fed. 618 (C. C. A. — Pa.).

Where a limited partnership association has received the consideration it is estopped to set up the defense to an action for the price that the contract was not signed by two managers. Here the company used the machine and claims title to it. *Yaryan Co. v. Penn. Glue Co.*, 180 Pa. St. 480, 36 Atl. 1080.

Wives of other shareholders as shareholders may make the requisite seven to organize. "Ltd." is sufficient for "Limited." The \$500 limit if violated does not make them liable as general partners. *Bernard Co. v. Packard*, 64 Fed. 309 (C. C. A. — Pa.).

An association was liable for ore purchased by authorized officer but without a contract executed as required by statute for liabilities over \$500. The deliveries were each less than that and the company had the use of it. Held: The company is liable. *McLaughlin v. Center Co.*, 10 Pa. Co. Ct. 533.

So of assessments on a mutual fire insurance policy which it had held and enjoyed twenty months. *Interstate Co. v. Brownback*, 1 Pa. Super. Ct. 183.

¹⁸ An action against a limited partnership association under Act of 1874 should be brought in the firm name instead of that of the partners. *Ladner v. Gibbon*, 6 Weekly N. C. 127.

Tort for negligence of stockholders of a limited joint stock company, but the company was served, appeared and defended. A verdict against the company was sustained. *Wilkinson v. Evans*, 34 Pa. Super. Ct. 472.

¹⁹ An attaching creditor gets the same rights in stock of a limited partnership association that his debtor had and though the assignee of the debtor did not till afterwards comply with all the requirements

remaining decisions might be accounted for on either theory.²⁰

In Michigan the "partnership association limited" closely resembles the Pennsylvania "limited partnership association." There seems to be a tendency to treat them as corporations,²¹ though it is admitted that

for a formal transfer, the assignment from the debtor was complete before that and just as in the case of a corporation, the association could not refuse to record the transfer on compliance with the formalities. *Tide Water Pipe Co. v. Kitchenman*, 108 Pa. St. 630, 636.

A member of a limited partnership association may sue it for a debt due him. *MacGeorge v. Chemical Mfg. Co.*, 141 Pa. St. 575, 21 Atl. 671.

A declaration of forfeiture by trustees which does not follow notification of default exactly as required in the by-laws is void and title to the shares remains in the shareholders. *Morris v. Mettalline Co.*, 164 Pa. St. 326, 30 Atl. 240; 166 Pa. St. 351, 31 Atl. 114.

On death of member of a limited partnership association a petition for appraisal of assets was filed by his executor to fix the price to be paid by the company for the shares. Held entitled to *pro rata* share of profits made after death of member. *Re Henry Disston, etc. Co.*, 8 Weekly N. C. 58.

²⁰ The surplus of a limited partnership association making steel springs may be invested in stock of a steel company to insure a supply of steel. Not *ultra vires*. *Layng v. A. French Co.*, 149 Pa. St. 308, 316, 24 Atl. 215.

A limited partnership to refine oil may purchase stock in an oil refining company. Where members have allowed managers to pursue a policy for two years, they are barred by *laches* from objecting. *Patterson v. Tidewater Co.*, 12 Weekly N. C. 452.

A partnership association limited is not liable on checks issued by its treasurer without authority modifying a contract. *Straw v. Murray*, 192 Pa. St. 642, 38 Atl. 576.

Chairman of a limited partnership association who was entrusted with the management of its affairs had power to mortgage its property to secure a creditor of the company. Appeal of *Fisher*, 14 Atl. 225 (Pa.).

Managers of limited partnership association have no power to sell its entire property without the consent of all the shareholders. *Carter v. Producers Co.*, 164 Pa. St. 463, 30 Atl. 391.

An assignment for the benefit of creditors made by the chairman and secretary of a limited partnership association pursuant to authority of stockholders is valid without formal vote of managers though the by-laws provide that the managers shall have entire control of the business of the company. *Rodgers Printing Co. v. Santa Claus Co.*, 11 Pa. Co. Ct. R. 529.

²¹ Limited partnership associations are governed by the law of corporations rather than by the law of limited partnerships. This was a proceeding to collect subscription to shares. Defense that paid by

not all legislation affecting corporations is applicable to these associations.²² There is a provision similar to that in Pennsylvania making the association liable on contracts involving over five hundred dollars only if signed by two managers.²³ The members are liable as

notes. *Winding up. Rouse v. Detroit Cycle Co.*, 111 Mich. 251, 257, 69 N. W. 511.

Those who deal with a partnership association limited are estopped to deny its existence just as they would be in dealing with a corporation. "Each is a legal entity whose sole warrant for existence is found in and whose powers and liabilities are fixed by statute." Hence he cannot for slight irregularities in organization hold as general partners shareholders not responsible for and ignorant of them. Refuses to follow Pennsylvania cases. *Staver Co. v. Blake*, 111 Mich. 282, 288, 69 N. W. 508.

Oral evidence of what was said at meeting of shareholders of a partnership association limited is not admissible when the record is not ambiguous. *Lipsett v. Hassard*, 158 Mich. 509, 511, 127 N. W. 1091.

Evidence showed no contract for salary between a partnership association limited and its president. *Berry Bros. v. Hooper's Est.*, 179 Mich. 67, 146 N. W. 275. But in a more recent case it was said that a member of such an association is not in a worse position as to interest on advances to the firm than a member of an ordinary partnership. *Mack v. Engel*, 165 Mich. 540, 550, 131 N. W. 92.

²² Certain provisions of the constitution are made applicable to all associations and joint stock companies having any of the powers or privileges of corporations. But it does not follow that all provisions in later legislation as to corporations apply to partnership associations. The provision for minority representation is one that does not apply. *Attorney General v. McVickie*, 138 Mich. 387, 389, 101 N. W. 552.

²³ *Geel v. Goulden*, 168 Mich. 413, 421, 134 N. W. 484; *McCain v. Smith*, 172 Mich. 1, 137 N. W. 616, 619.

Plaintiff had a claim for a commission on G. who had sold certain patents to defendant, a Michigan limited partnership association. Plaintiff claimed defendant promised to pay it. Held: Under Michigan statute not liable because \$500 involved and not formally executed. No estoppel because plaintiff had no share in the title to the property that was being transferred. *Dickinson v. Matheson Co.*, 161 Fed. 874 (C. C. — Pa.).

Endorsement of a note for over \$500 by only one manager does not impose liability on a partnership association limited for any amount. *Citizen's Bank v. Vaughan*, 115 Mich. 156, 73 N. W. 143.

Transfer by endorsement of notes of a shareholder in payment of a claim against it was not an incurring of a liability within the above clause. *Shaw, Kendall & Co. v. Brown*, 128 Mich. 573, 87 N. W. 757.

A contract creating a liability of over \$500 made by a single manager of a partnership association limited is a nullity and binds neither party. *Hoyt v. Paw Paw Grape Juice Co.*, 158 Mich. 619, 123 N. W. 529.

Spirit of statute complied with where there was a record of a meet-

general partners if the organization is not strictly according to statute.²⁴ In a few other States the statutes authorizing limited partnerships seem to have been found adaptable to the needs of unincorporated associations,²⁵ but in most States they are not fit for that purpose.²⁶

ing of all the managers who voted to approve the contract which was then closed, though it was signed only by the president. *Howard v. Factory Land Co.*, 167 Mich. 251, 131 N. W. 113.

²⁴ A partnership association limited failed to record its articles and stock was sold plaintiff by one member on false representations. Plaintiff sues all as general partners for cancellation of certificate and repayment of purchase price. Held for plaintiff. *Nichols v. Buell*, 157 Mich. 609, 122 N. W. 217.

A partnership association limited filed a schedule purporting to show the property for which the stock was issued and the subscribers. A block of stock was issued to one promoter in consideration of property and turned back by him into the treasury. The property was described only generally as the property of a former corporation, not specifically. On a shareholder's action to cancel and recover her subscription to treasury stock, Held: Statement not in compliance with the statute and the contributions of property cannot be treated as payments of capital stock. But one who did not become a shareholder till after this schedule was filed and then bought treasury stock is not liable to pay up the balance of his shares which he bought at a discount. *Macomber v. Endion Co.*, 160 Mich. 54, 59, 125 N. W. 26.

A shareholder cannot rescind contract of purchase of his shares on ground that the partnership association limited was not legally organized when the only objection was that it did not acquire valid title to all the property scheduled in its articles and possibly the amount of cash capital was overstated. *Andrews v. Brace*, 154 Mich. 126, 117 N. W. 586.

²⁵ Under statute of limited partnership associations a shareholder is liable to extent of unpaid subscriptions after judgment against the association is returned unsatisfied. But the estate of a deceased shareholder is not liable on a debt incurred after his death. *Bodey v. Cooper*, 82 Md. 625, 628, 34 Atl. 362.

Liability of members of limited partnerships in Virginia by statute is limited to unpaid subscriptions. The legislature indicated certain contingencies where the members should be liable as general partners. If it had intended to impose this for failure to comply exactly with the statute, the legislature would have said so. *Deckert v. Chesapeake, etc. Co.*, 101 Va. 804, 810, 45 S. E. 799.

A deed of land of a partnership association formed under the laws of Virginia executed by the association and also by all the members and stockholders of it is sufficient to pass its title. *Richmond v. Pinnix*, 208 Fed. 785, 791 (D. C. — N. C.).

²⁶ In Massachusetts, for example, where unincorporated associa-

§ 10. Defective Incorporations

When a group of individuals attempt to form a corporation and so far fail that they do not become a corporation *de facto*,¹ their legal relation creates a problem upon which courts have differed. Most jurisdictions have argued that there is no intermediate organization between partnership and corporation and that as they are not a corporation they must be a partnership.² Others have held that because the intent was to form a corporation with limited liability of members, they cannot be held to the full liability of partners.³ Since it is well settled in the law of partner-

tions have been elaborately developed, the statute, Rev. Laws Ch. 71, requires filing a certificate with the names of the partners which would make impracticable any attempt at transferable shares.

¹ For an analysis of the decisions on *de facto* corporations, see an article by Prof. Edward H. Warren, 20 Harv. L. Rev. 456.

² *Re Mendenhall*, Fed. Cas. No. 9425 (savings association); *Coleman v. Coleman*, 78 Ind. 344, 346 (manufacturing company); *Kaiser v. Lawrence Savings Bank*, 56 Ia. 104, 116, 8 N. W. 772 (manufacturing company); *Central Bank v. Sheldon*, 86 Kan. 460, 121 Pac. 340 (no organization in good faith under an Arizona incorporation); *Kierstead v. Bennett*, 93 Me. 328, 332, 45 Atl. 42 (note of treasurer of a Trotting Park Association); *Whipple v. Parker*, 29 Mich. 369, 380 (manufacturing company); *Fuller v. Rowe*, 57 N. Y. 23, 26 (manufacturing company). But see apparently *contra*, *Hudson v. Spalding*, 6 N. Y. S. 877 (baseball club); *Farmer's Co. v. Jones*, 147 S. W. 668 (Tex. Civ. App.) (stockholders running a business pending reorganization). In one case they were described as an "unincorporated association." *Ben Co. v. Zimmerman*, 110 Md. 313, 321, 73 Atl. 19.

³ Agreement to act as member of provisional committee of projected railroad did not make defendant liable as partner. *Reynell v. Lewis*, 15 M. & W. 517, 529; *Wilson v. Curzon*, 16 L. J. Ex. 122.

But directors of water supply company which failed to get charter were held on contract to build works. *Doubleday v. Muskett*, 7 Bing. 110, 116.

Subscribers to and stockholders in defectively organized corporation are not partners as to the business carried on. *Fay v. Noble*, 7 Cush. 188; *Trowbridge v. Scudder*, 11 Cush. 83; *Ward v. Brigham*, 127 Mass. 24.

Where the subscriber is induced to go in by fraud of a promoter, whether partners or not, was not decided. *Perry v. Hale*, 143 Mass. 540, 10 N. E. 174.

Transacting business before certificate issued, though contrary to

ship that intent to escape personal liability does not protect those who do acts which otherwise would constitute them partners,⁴ it would seem that an association for profit which fails to carry out its intention to become incorporated should be held to be a partnership unless that jurisdiction is prepared to recognize the legal existence of associations as intermediate between partnership and corporation.

Promoters of corporations may or may not be partners as to the business of organizing the corporation, but they are not partners merely because they contemplate doing business in the future through a corporation nor because they are numerous.⁵

A slightly different situation arises when an undoubted association decides to incorporate. Here there is a partnership to start with and all hold that it continues until incorporation is complete. Where a special charter has been granted the partnership continues until the charter is accepted by some unequivocal act.⁶

statute, does not make them partners. *First National Bank v. Almy*, 117 Mass. 476.

But agent of a projected bank who tried to get charter and failed was allowed to hold members for his services whether or not they attended the meeting that authorized them. *Sproat v. Porter*, 9 Mass. 300, 303.

There is a curious old case that is apparently the converse of the above doctrine. Association formed to buy and run a steamer. Stipulation that no signer be liable beyond amount of his subscription. Later, part of them got a charter providing that shareholders be liable for debts. Held: Original agreement did not provide for incorporation. This changed the agreement. Partners may object to limited liability of co-partners. Defendants not bound unless they assented to new agreement, because it changed scope of the partnership and plaintiff subscribers cannot compel defendants to pay their subscriptions. *Southern Steam Packet Co. v. Magrath, McMull. Eq. (S. C.)* 93, 100.

⁴ *Davison v. Holden*, 55 Conn. 103, 112 (coöperative store). See § 17.

⁵ *Arnold v. Conklin*, 96 Ill. App. 373; *Barnett v. Lambert*, 15 M. & W. 489; *Reynell v. Lewis*, 15 M. & W. 517.

⁶ The members are individually liable for debts incurred before

When an association is incorporated a formal conveyance is necessary to pass title to its real estate to the corporation.⁷

§ 11. Formal Associations for Profit

A form of group organization has developed which has taken on the feature of transferable shares and by the stipulations of elaborate trust deeds has endeavored as far as possible to adopt the desirable characteristics of corporations. These associations in simple forms were used in some States, notably Massachusetts at an early date.

"So when companies have been formed without incorporation, consisting of considerable numbers, for the purchase of wild lands, with a view to a resale or other like purpose, the grant is made to trustees in trust for several members designated and a certificate of such right to an aliquot part of the beneficial interest is usually issued by the trustees to the several parties, indicating what aliquot part each holds in such trust property or beneficial interest; and such certificates are well understood as muniments of property."¹

One of the earliest examples of this form of combination in this country was that used by the original Sugar Trust² and the original Standard Oil Trust.³

but not after incorporation. *Durham Co. v. Clute*, 112 N. C. 440, 17 S. E. 419.

Vote to accept charter, but no formal organization under it or transfer of assets. Held partnership. *Willis v. Chapman*, 68 Vt. 459, 35 Atl. 459.

⁷ A joint stock company was incorporated. Land stood in name of trustees for the former. No deed to latter executed. Held: No title in corporation. *Frank v. Drenkhahn*, 76 Mo. 508.

¹ *Attorney General v. Federal St.*, 3 Gray 1, 46.

² *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 623, 24 N. E. 834.

³ *State v. Standard Oil Co.*, 49 Ohio St. 137, 178, 30 N. E. 279.

Most of the members composing these associations were corporations. The combinations were held to be illegal under State laws prohibiting monopolies and the corporations composing them were dissolved.

It has been earnestly contended that the trust deeds by which these organizations are created violate the rule against perpetuities and that forbidding restraints upon alienation unless limited to twenty-one years after a life or lives in being at the creation of the trust. In a leading case the court said:

“Is the trust void as creating a perpetuity, or imposing an illegal restraint upon alienation? The right of a shareholder to convey his own shares, or interests, under the trust is in no way restricted, but it is contended that illegality is found in the circumstance that no sale of the corpus of the trust, and no termination of the trust, will necessarily occur within the period of a life or lives in being at the time of the creation of the trust and twenty-one years, and that the provision that the certificate holders shall not have partition of the land, and can compel its sale only by a three-fourths vote, works an illegal restraint upon alienation.

“The trustees take the legal title to allow the association through its directors to manage the land and to enjoy its rents and income, and to sell the land free of trusts at the will of the association, with a further provision for the termination of the trust by vote of the association at any time after July 1, 1895. Leases for more than five years, and sales, can be made only in accordance with an affirmative vote of three-fourths of the shares, and a like vote is necessary to terminate the trust. The substance of the situation is that the shareholders for the time being have the whole equi-

table estate in the *corpus* of the trust, and can at all times sell and transfer their equitable estates at their own pleasure; and the trustees hold the legal title in fee simple in trust to do with the land whatever may be required by the owners of the equitable estate, which owners have full capacity, at all times and at their own option, to require a sale of the land discharged of the trust, or the immediate termination of the trust after a period of five years and a few days, the owners of the equitable estate being a voluntary association, the beneficial interests in which are represented by shares, and the association acting by vote of the shareholders. That the directions of the association to the trustees are to be given by three-fourths votes, rather than by majority votes, is immaterial, since it cannot be said that one is more improbable than the other: either is a reasonable way of declaring the will of the association, and there is no provision that a vote to sell or to end the trust must be passed within any stated period, or at all.

“Such a trust for the convenience of an unincorporated association in renting and selling the land, under which the land is held for no other purpose, and where the income is not accumulated but is distributed as it accrues, and where the land is to be sold free of trusts at the will of the association, and where the whole equitable interest in the trust is at every moment vested absolutely in those who at that moment are shareholders, and never can become vested in any other persons save by act of the absolute owners or by operation of law upon their property, and not by force of any limitation contained in the deed of trust, the equitable interests so vested being also constantly vendible

by their several owners without let or hindrance, as well as subject to their debts and passing like other property upon death by virtue not of the deed of trust but of the general laws governing the disposition of the property of decedents, withdraws no property from commerce, and is not within the reason of what is called the rule against perpetuities. The trust involves no future limitations, no restraint upon alienation, and no accumulation either of income or of principal. The provisions by which the trust fund may be at some time held for the benefit of persons not shareholders at its inception, and who may become such at a period more remote than that allowed by the rule, are not future limitations made by the trust deed in the sense in which the word 'limitation' is used in speaking of the operation of the rule. If there shall ever be a shareholder other than those in whom the whole equitable estate was absolutely vested at the inception of the trust, that shareholder will not take his interest by virtue of a limitation in the trust deed, but because of his succession by virtue of the general principles of law to the property of the original shareholder. The new shareholder, with reference to the rule, is in the same situation as a person who, after the expiration of all lives which were in being when a fee or an estate tail was created, and of a further period of twenty-one years, takes the fee by the operation of the law which makes property vendible by or descendible from the owner, and not by virtue of a limitation in the instrument which created the fee. The entire ownership is never for a moment uncertain, nor unvested, and at every moment each owner can freely dispose of his property, and at each moment it can be transferred to

his creditor by the ordinary process of the law, and at each moment the trust can be terminated at the will of the owners of the equitable interest.”⁴

Although this decision was by only a majority of the court, it has been frequently cited since in Massachusetts without criticism and may be assumed to be the law in that State. In the only other decision on the point in which a business enterprise was concerned, the Illinois court said: “Where there are persons in being at the creation of an estate capable of conveying an immediate and absolute estate in fee in possession there is no suspension of the power of alienation and no question of perpetuities can arise.”⁵

The contention that these trusts, unless limited in duration to the period permitted by the Rule against Perpetuities, are illegal as restraints upon alienation because of the provision usually inserted that the shareholders shall have no right to demand partition or other division of their respective shares before the termination of the trust in the manner provided therein which without an express limitation of duration to a life or lives in being and twenty-one years thereafter might exceed that period. There are several English cases relating to non-profit associations where the trust was held invalid because of restrictions on the right to wind up the association.

A gift by will for the benefit of the Penzance Library was held void because the library was established for the use of subscribers only and one of the rules pro-

⁴ *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213. (The report of this case contains the full text of a real estate trust deed, though not of the most improved type).

⁵ *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246 (real estate development association). *Acc.* Gray, *Perpetuities*, 3d ed., § 509 L. See § 37, note 1.

vided that it should not be broken up as long as ten subscribers remained.⁶ A bequest to the Tunstall Athenæum and Mechanics Institution was held void for perpetuity the institution being a voluntary association and one of the rules providing that it should not be dissolved without the consent of nine-tenths of the members present at a meeting.⁷

Of these cases the court in *Howe v. Morse* says: "They were gifts to societies whose members took no personal beneficial interest in the property, which must be kept for the purposes of the society, and could not be disposed of by the members for the time being. These cases, there being no public charity, were simply private trusts and the gifts were bad because the members for the time being did not have power to alienate the estate." This court further said: "We express no opinion upon the contention that the interests of the shareholders are real estate and that an agreement not to make partition may be open to objection under the law as to perpetuities and restraints upon alienation. These are matters which upon any theory cannot make the whole trust illegal." That is, the court did not decide whether or not the provision depriving the shareholder of the right to partition might be declared void. As the case before them was a bill to enforce the right to dissolution regardless of this stipulation, it is hard to see why the court did not also decide that question in entering its decree.

Until the question is decided in other jurisdictions, however, it is safer to limit the duration of the trust to the period permitted by the Rule against Perpetuities,

⁶ *Carne v. Long*, 2 D. F. & J. 75, 79.

⁷ *In re Dutton*, 4 Ex. D. 54, 58. *Acc. Carrier v. Price* (1891), 3 Ch. 159, 169.

and this seems to be the usual practice. In our kaleidoscopic business life the enterprise will probably be reorganized well within the time limited. The limitation usually adopted is twenty years after the death of the survivor of certain persons named, who are usually the children of trustees or prominent shareholders. Since there might be inconvenience in tracing the lives of these individuals not officially connected with the trust if a question as to the proper time for termination of the trust should ever arise, a more satisfactory form would seem to be that employed on page 407 of the Appendix of Forms limiting the trust to twenty years from the death of the last survivor of the trustees named "and such other persons now living as shall hereafter become trustees of these presents before any person or persons not now living shall have become the only trustee or trustees thereof or the offices of trustees thereof shall have become entirely vacant whichever of the said periods shall first expire and at the expiration of the time so limited the said trusts shall terminate." It is important in using this form to recall that it must be so phrased that no interval could exist when all the present trustees are dead and none of their successors then in office were living at the date of the creation of the trust though subsequent trustees might be men who were living when the trust was created. Such a limitation has been held void for uncertainty.⁸

An examination of recent forms of such trust, copies of which are appended, will show how closely such an organization can be made to resemble an incorporated company. It is created by a declaration of trust by

⁸ *Ex parte* Exmouth, 23 Ch. D. 158, 163.

two or more individual trustees reciting that they are to acquire certain property, usually either real estate or corporate securities, and will hold it upon certain trusts. The management of the trust estate is vested usually in the trustees, but sometimes in a separate board of directors. It is usually provided that the trustees shall be self-perpetuating, but if they are also the managers, the shareholders frequently have power to elect or remove them. Subscribers to the trust fund receive transferable certificates for stock resembling as closely as possible corporate stock. There is provision for meetings and certain powers of the shareholders may be exercised by vote. It is the unlimited liability of partners for the debts of the concern that has made the ordinary partnership an unsatisfactory method of organization for modern business and an impossibility in dealing with large aggregations of capital of many investors. Recognizing the danger that the courts might hold them partnerships even in the face of their express declaration to the contrary, these trust instruments have developed ingenious methods for eliminating this personal liability of shareholders.⁹ The following quotation is from the deed of a well-known real estate trust owning a large office building in Boston:

“The shareholders hereunder shall not be liable for any assessment and the trustees shall have no power to bind the shareholders personally. In every written order, contract or obligation, which the trustees shall authorize or enter into, it shall be their duty to stipulate or cause to be stipulated that neither the trustees nor

⁹ These forms were originated in England. For an elaborate stipulation see *Re Professional Life Assurance Co.*, L. R. 3 Eq. 670, L. R. 3 Ch. 167, 36 L. J. Ch. 442 (clauses 263-266). See §§ 29-31.

shareholders shall be held to any personal liability under or by reason of such order, contract or obligation, and to refer or cause reference to be made to this agreement.

“Every act done, power exercised or obligation assumed by the trustees personally under the provisions of this instrument or in carrying out the trusts herein contained shall be held to be done, exercised or assumed, as the case may be, by them as trustees and not as individuals, and every person or corporation contracting with the trustees, as well as beneficiary hereunder, shall look only to the funds and property of the trust for payment under such contract or for the payment of any debt, mortgage, judgment or decree, or the payment of any money that may otherwise become due or payable on account of the trusts herein provided for or any other obligation arising under this agreement in whole or in part and neither the trustees nor the shareholders, present or future, shall be personally liable therefor.

“No bond or surety or sureties shall ever be required of any trustee acting hereunder, and each trustee shall be liable only for his own acts, and then only for wilful breach of trust.”

The validity and effect of such stipulations will be considered later.

§ 12. The Law Applicable to Informal Associations for Profit

The legal problems involved in the form of organization in which associations for profit originally developed are few and simple. These associations are formed by the adoption at a meeting of the members of articles of

association or a constitution and by-laws. Such documents closely resemble those of that large group of social and fraternal organizations which are clearly not partnerships, as we shall see hereafter.¹ The distinction between partnerships and these other associations is that the purpose of the former is the pecuniary gain of the members² while the latter are non-profit associations. To the former the rules of partnership are applicable, to the latter the rules of agency only. In both appears the element of association. Though there are certain kinds of associations as to the classification of which the courts have differed in opinion, that is as to whether they were profit or non-profit associations,³ as to most of them there can be little doubt. When once you have determined that one of these associations is a partnership, moreover, few problems arise in the application to it of the rules of partnership. From the very informality of their organization, no attempt has been made to modify by agreement the usual obligations of partners. Many of the rules regarding membership in social clubs from which this form of organization is derived are held applicable. It seems more appropriate to discuss these rules in detail when dealing with non-profit associations. Where there is provision for transferable membership or shares questions arise as to the beginning and ending of partner-

¹ See § 54.

² *Tyrrell v. Washburn*, 6 Allen 466; *Ashley v. Dowling*, 203 Mass. 311, 317, 89 N. E. 434.

³ See § 54.

Courts have differed as to fraternal insurance orders. One was held a partnership in *Babb v. Reed*, 5 Rawle 151.

One court seemed to assume that a lodge might be a partnership. *Whitcomb v. Smart*, 38 Me. 264, 266.

A socialistic community was held a "universal partnership." *Goesele v. Bimeler*, 5 McLean 223, s. c. Fed. Cas. No. 5503, aff'd 14 How. 589.

ship liability which will be treated when the rules applicable to all associations for profit are considered, but it is usually held that such an association is still a partnership in spite of the addition of this feature characteristic of associations but unusual in ordinary partnerships.⁴ In some of the cases, however, there are dicta that associations for profit with transferable

⁴ *Tyrrell v. Washburn*, 6 Allen 466.

Joint stock companies or societies which are not sanctioned expressly by the legislature pursuant to some general or special law are nothing more than ordinary partnerships and the laws respecting them are the same. *Wells v. Gates*, 18 Barb. 554.

Association to build a slaughter house. Constitution provided that the directors should not incur indebtedness beyond the available capital of the company and that constitution could be altered at any regular meeting by two-thirds vote. Directors incurred debts in construction of building and sue shareholders for indemnity. Transferable shares. Held: "The unincorporated association known as The Union Pork-house Company is to be regarded as merely a co-partnership and subject to the rules governing that branch of the law. It did not lose its real nature as a partnership because certain of its members were constituted directors and its members were called stockholders and a constitution and by-laws were adopted and the number of its members was large. It might be deemed expedient to appoint directors to act as the special agents for managing the affairs of the company instead of leaving each member, as in an ordinary partnership, to act as general agent for the transaction of business in the ordinary way. The company, too, might be a partnership, although its capital stock be divided into shares which by the articles of association are made transferable on the books of the company" (p. 526). Hence the directors as partners could not bind non-assenting partners to liabilities in violation of the constitution and that could be amended only at a regular meeting as it provided (p. 528). *McFadden v. Leeka*, 48 Ohio St. 513. 28 N. E. 874.

A banking association had transferable shares, but by-laws stipulated that shares could not be transferred without consent of directors. In an action by the bank's trustee on a note defendant pleaded that he had taken a transfer of stock from a member on the understanding that it would be accepted in payment of the note. Held: "While such an association has some analogy to a corporation in its by-laws and rules, it is still a mere partnership and these laws and regulations are analogous to the terms of an article of co-partnership by which each member binds himself to the others." "In buying into the partnership, the purchaser of the stock is bound to know the rules and regulations which govern it. He cannot ask to be made a partner unless upon the terms imposed upon his entrance into the partnership." Hence he never became shareholder. *Logan v. McNaugher*, 88 Pa. St. 103, 106.

shares, sometimes called joint stock associations, hold a position intermediate between corporations and partnerships.⁵

§ 13. The Law Applicable to Formal Associations for Profit

The form of unincorporated association which, it is believed, has greatest possibilities of future development because independent of legislative authorization, is the association organized under a deed of trust with transferable shares and elaborate provisions for limitation of liability of the shareholders. These associations have evolved from the ordinary trust created by will or *inter vivos* for the benefit of a class. Since some of them combine the elements of both partnership and trust while others are essentially trusts and not partnerships, and since there are similar relations which are merely tenancies in common, it becomes important to examine in detail the distinctions between them.

⁵ *In re The Associated Trust*, 222 Fed. 1012 (D. C. — Mass.); *Spottswood v. Morris*, 12 Idaho 360, 85 Pac. 1094, 1102; *Hossack v. Development Association*, 244 Ill. 274, 291, 91 N. E. 439; *Cox v. Bodfish*, 35 Me. 302, 306; *Cincinnati Co. v. Citizen's Bank*, 11 Ohio Dec. 50; *Tenney v. N. E. Protective Union*, 37 Vt. 64, 68.

In a suit by heirs to establish rights in an insurance certificate of membership, the court said: "Many authorities and especially the older decisions have proceeded on the idea that an association of individuals must either be a corporation or an absolute partnership and this was the theory upon which the plaintiff tried this case. The contention of the plaintiff's counsel is that the members of this association in so far as their rights in themselves are involved must be regarded as partners and their legal liability fixed accordingly. This proposition is correct unless by the by-laws of their organization the pecuniary liability of the members is limited and is only to be enforced in a certain way and upon certain contingencies. . . . The by-laws and constitution of such a society constitute a contract. It is the province of the courts to enforce and give effect to such a contract according to its evident meaning." *Hammerstein v. Parsons*, 38 Mo. App. 332, 335.

§ 14. The Distinction between Partnerships and Trusts

It is frequently a difficult problem to determine the line that divides the partnership from the trust.¹ The subject has been most frequently considered by the English courts and by the courts of Massachusetts. A decision by Judge Loring of the Supreme Judicial Court of the latter State reviewed the previous decisions and for the first time defined a test for determining the nature of such organizations. We therefore quote at length from the opinion.

“Several instances of such partnerships are to be found in our reports. In *Hoadley v. County Commrs. of Essex*, 105 Mass. 519, one Gordon McKay executed a declaration of trust by which he declared that he held his patents for sewing the soles of boots and shoes to the vamps, his factory where machines were manufactured under these patents and the whole business theretofore carried on by him, in trust for such persons as should buy certificates which were to be issued under that declaration of trust to the amount of fifty thousand in number, the proceeds to be used in carrying on the factory and business assigned to and held by the trustee. The certificate holders were to be known as the McKay Sewing Machine Association and the business was to be conducted by an executive committee to be chosen by them.

“This was held to create a partnership, and for that

¹ It was held that the Sugar Trust was a partnership, and a corporation entering the partnership *ultra vires* was therefore dissolved. *People v. North River Co.*, 121 N. Y. 582, 623, 24 N. E. 834. The court mentioned but did not decide the question in *State v. Standard Oil Co.*, 49 Ohio St. 137, 176, 30 N. E. 279. Associations engaged in trade have long been held partnerships whether their property was vested in the association, *Alvord v. Smith*, 5 Pick. 232, 235, *Taft v. Ward*, 106 Mass. 518, or in trustees for it, *Phillips v. Blatchford*, 137 Mass. 510.

reason the shares were held not to be taxable to the holders of them. For a subsequent case involving the same association, where the same conclusion was reached, see *Gleason v. McKay*, 134 Mass. 419. In *Whitman v. Porter*, 107 Mass. 522, certain subscribers associated themselves together to buy a ferry boat to be run between Agawam and Springfield; the boat was to be conveyed to one of the subscribers in "trust" and the entire business was to be conducted by these trustees and their officers to be annually elected by the subscribers. The stock was assignable. These stockholders were held to be partners. In *Phillips v. Blatchford*, 137 Mass. 510, the money to carry on the business of manufacturing and selling grates was raised by the sale of transferable certificates issued under a somewhat similar declaration of trust which provided that the business should be carried on by a board of managers of whom the trustee was to be one, and the other members were to be elected by the shareholders. This also was held to be a partnership. In *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, the doctrine of these cases was extended to a case where the purpose of the association was to buy cars to be leased to a specified railroad. The persons providing the purchase money were to have transferable certificates, which certificates by the terms of the lease to the railroad were to be paid in ten annual instalments with six per cent. interest until paid. The certificate holders were declared in the declaration of trust to be an association, and all the business was to be transacted by a board of managers to be elected by them. The property of the association was to be held by the American Loan & Trust Company as trustee. This also was held

to be a partnership. *Williams v. Boston*, 208 Mass. 497, was a similar case. The trust agreement in that case provided that the trust was established "for the purchase, development and disposition of" the former site of the Museum of Fine Arts in Boston. The property was to be held by trustees, but the shareholders had a right to remove the trustees, and meetings of the shareholders were to be held at which the shareholders might authorize or instruct the trustees in any manner and alter or amend the declaration of trust, or direct the trustees to end the trust, sell the property and distribute the proceeds. The original papers in the case show these to have been the facts of the case although they are not stated in the report of that decision. The property of this association was held to be taxable as partnership property.

X "In *Mayo v. Moritz*, 151 Mass. 481, on the other hand, it was held that certificate holders under the declaration of trust there in question were not partners. In that case an inventor transferred his invention to trustees to whom by the terms of the trust indenture the patent was to be issued when it was issued. The trust indenture provided for the issue of scrip to those who should furnish to the trustees the money necessary for the more advantageous disposition of the invention. The trust on which the trustees were to hold the invention and the money produced by the issue of scrip was to hold, manage and dispose of the invention or any part thereof or interest therein upon such terms as to them (the trustees) or a majority of them should seem best, the net proceeds to be paid one-half to the inventor and the other half to the holders of the scrip or certificates. The scrip, called in the trust indenture scrip

or certificates, was transferable. Vacancies in the office of trustees were to be filled by the remaining trustees. It was held that the scrip holders were not partners, and in that respect the case was unlike *Gleason v. McKay*, 134 Mass. 419, and *Phillips v. Blatchford*, 137 Mass. 510.

“The difference between *Hoadley v. County Commrs.*, 105 Mass. 519 (involving the same indenture as that in *Gleason v. McKay*, 134 Mass. 419), *Whitman v. Porter*, 107 Mass. 522, *Phillips v. Blatchford*, 137 Mass. 510, *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, and *Williams v. Boston*, 208 Mass. 497, on the one hand, and *Mayo v. Moritz*, 151 Mass. 481, on the other hand, lies in the fact that in the former cases the certificate holders are associated together by the terms of the “trust” and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property. The property is their property. They are the masters. While in *Mayo v. Moritz* on the other hand there is no association between the certificate holders. The property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo v. Moritz* had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them. As was said by C. Allen, J., in *Mayo v. Moritz*, 151 Mass. 481, 484: “The scrip holders are *cestuis que trust* and are entitled to their share of the avails of the property when the same is sold,” and that is all to which they were entitled. In *Mayo v. Moritz* the scrip holders had a common interest in the trust fund in the same sense that the members of a class of

life tenants and the members of a class of remaindermen (among whom the income of a trust fund and the corpus are to be distributed respectively) have a common interest. But in *Mayo v. Moritz* there was no association among the certificate holders just as there is no association although a common interest among the life tenants or the remaindermen in an ordinary trust. For a decision in this Commonwealth somewhat like *Mayo v. Moritz*, *ubi supra*, see *Hussey v. Arnold*, 185 Mass. 202. See also in this connection *Makin v. Sav. Inst.*, 23 Me. 350; *Burt v. Lothrop*, 52 Mich. 106.

“There is a case in England (*Smith v. Anderson*, 15 Ch. D. 247) in which the distinctions between cases like *Hoadley v. County Commrs.* and *Mayo v. Moritz* was pointed out and established, and that case is now the established law in England. In *Smith v. Anderson* (decided by the Court of Appeals in 1880), the trust deed provided for the purchase by trustees of shares in the capital stock of eleven different submarine telegraph companies. The money was to be furnished by subscribers to whom transferable certificates were to be issued. The income derived from the submarine shares and the proceeds of any sales of them were to be applied by the trustees (1) in paying six per cent. interest on the trust certificates issued under the trust; (2) in redeeming these trust certificates at £120; and finally, when (3) all the certificates had been redeemed, the surplus, if any, was to be divided among the former certificate holders. It was held that this was a trust and not a company, association or partnership which had to be registered under companies act of 1862 (25 & 26 Vict. c. 89) § 4. That act provided that “No company, association or partnership . . . shall be

formed . . . for the purpose of carrying on any other business (that is to say, any business other than banking) that had for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered." This conclusion was reached on the ground that there is a difference between a partnership where money raised by the issue of transferable certificates is to be held by so-called trustees who are really managing agents and a trust where money raised by the issue of transferable certificates is to be held by trustees properly so-called, and that the distinction between the two is that which we have just stated in detail.

"The decision in *Smith v. Anderson* is the law of England to-day, although by reason of some special facts in that case and the way in which the question arose doubts as to the conclusion reached in that case have been thrown out by two or three individual judges. For the subsequent cases see *Crowther v. Thorley*, 32 W. R. 330; *In re Siddall*, 29 Ch. D. 1; *In re Jones* (1898) 2 Ch. 83, 91. For two cases where the distinction between managing agents who hold the legal title and trustees properly so-called is reaffirmed, see *In re Thomas*, 14 Q. B. D. 379, 383; *In re Faure Electric Accumulator Co.*, 40 Ch. D. 141, 151, 152.

"This brings us to the question of the character of the Boston Personal Property Trust. It is plain that it is a trust and not a partnership. By the terms of the indenture of trust the property contributed by the certificate holders, or that bought with money contributed by them (the original trust property could be acquired in both ways by the terms of the indenture of trust), was to be held by the trustees in trust to pay the income

to the holders of the certificates, and on the termination of the trust to divide the trust fund or the proceeds thereof among them. The certificate holders are throughout called *cestuis que trustent*. The certificate holders, or *cestuis que trustent*, are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which (under the trust indenture) they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders or *cestuis que trustent* can do is to give or withhold their consent to the trustees taking such action. And the giving or withholding of consent by the *cestuis que trust* is not to be had in a meeting, but is to be given by them individually. As we have said, no meeting of the *cestuis que trust* for that or any other purpose is provided for in the trust indenture. The trustees of the Boston Personal Property Trust have a right to sell the trust securities and re-invest the proceeds, and also a limited power to borrow on the security of the trust property. The certificate holders, or *cestuis que trustent* as they are called in the trust deed, have a common interest in precisely the same sense that the members of a class of life tenants (among whom the income of a trust fund is to be distributed) have a common interest, but they are not *socii*, and it is the trustees, not the certificate holders, who are the masters of the trust property. The sole right of the *cestuis que trust* is to have the property administered

in their interest by the trustees, who are the masters, to receive income while the trust lasts and their share of the *corpus* when the trust comes to an end."

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"It was stated in a passing remark made by this court in *Williams v. Johnson*, 208 Mass. 544, 552, that in the trust before the court in that case the certificate holders were partners within the meaning of that word in St. 1909, c. 490, Part I, § 27. While that trust provided for meetings of the shareholders and in that respect for some association of and among them, an examination of the original papers shows that it was a trust and not a partnership. This remark was in no way essential to the decision in *Williams v. Johnson*." ²

The essential characteristics of an association for profit, as defined by Judge Loring, which distinguish it from a trust are (1) the association of the beneficiaries, (2) their power as principals to control the management of the property by the trustees, their agents.

It has been well said by a distinguished authority that an exact definition of partnership at common law is impossible.³ The most effective method of analysis is therefore to determine the characteristics which distinguish partnership from other similar relations. Both partnership and trust have for their purpose the pecuniary gain of the members. In a partnership, however, the partners stand towards that enterprise in the relation of co-proprietors⁴ and that is the relation of the certificate holders in associations for profit towards the business of the association. It is evidenced by their power to control the operations of the enterprise through

² *Williams v. Milton*, 215 Mass. 1, 6, 12, 102 N. E. 355.

³ *Lindley, Partnership*, Vol. I, p. 1.

⁴ *Estabrook v. Woods*, 192 Mass. 499, 502, 78 N. E. 538.

their control of the trustees. In a trust the beneficiaries have only the right to compel the trustee to account⁵ and to charge him with the consequences of dishonesty or neglect⁶ and cause his removal for the one offense or the other.⁷ Within these broad limits the trustee alone is to determine the method of carrying out the purposes of the trust.⁸ Most rules of the law of partnership are easier to state than to apply. The tests laid down by Judge Loring will require still further definition. How much control by the beneficiaries over the trustee is needed to change a trust into a partnership? Under many of these deeds of trust the only way in which the shareholders can expressly control the action of the trustee is through their power of election at the annual meeting. This indeed may prove in practice a very effectual power to direct his action during his term of office, but does it come within Judge Loring's definition of a partnership?⁹

A later decision of the Massachusetts court in drawing the distinction between trust and partnership emphasizes control and omits all reference to the element of association. No issue was involved in the case requiring a decision on this point and it is wholly uncertain whether the omission was accidental or deliberate. The court said:

"A declaration of trust or other instrument providing for the holding of property by trustees for the bene-

⁵ *Weaver v. Fisher*, 110 Ill. 146; *Hayes v. Hall*, 188 Mass. 510, 512, 74 N. E. 935.

⁶ *Barker v. Barker*, 14 Wis. 131.

⁷ *Scott v. Rand*, 118 Mass. 215.

⁸ *Life Ass'n of Scotland v. Siddal*, 3 De G. F. & J. 58, 74.

⁹ See the opinion of Morton, J. *In re The Associated Trust*, 222 Fed. 1012 (D. C. — Mass.) and § 16 *post*. See also *Smith v. Anderson*, 15 Ch. D. 247, 284; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246.

fit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership. That was explained at length in *Williams v. Milton*, 215 Mass. 1. Tested by the principles there laid down, the Buena Vista Fruit Company is a partnership and not a trust. It is a voluntary association organized under two instruments, one called a 'declaration of trust' and the other 'by-laws.' These two instruments provide that the shareholders representing two-thirds in value of outstanding shares have power to remove either or all of the trustees at any time, without assigning any cause, and to appoint others to fill the vacancy; to terminate the trust at any time earlier than that limited for its duration in the declaration of trust, and to terminate it by requiring conveyance of the property to other trustees upon new trusts, or to a corporation. A majority of the shareholders at any time by vote may amend the declaration of trust. The by-laws may be 'altered, amended, repealed' by vote of the majority of the shareholders 'at any annual or special meeting of the . . . shareholders.' These provisions demonstrate that this association is a partnership and not a trust."¹⁰

It would seem that the element of association is essential to a partnership. Indeed it is at the very basis of the conception of an ordinary partnership. The power to

¹⁰ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009.

control the acts of trustees or agents follows as a consequence of the existence of another essential element of the partnership relation, that of co-proprietorship of the business enterprise. It is to be hoped, therefore, that the restatement of the law attempted in the opinion in *Frost v. Thompson* will not be regarded by the court hereafter as in any way modifying the definition of Judge Loring in *Williams v. Milton*. The opinion proceeds to state as a further ground for its decision that the notes in suit were not the notes of the trustees, but notes of the treasurer of the association made in accordance with the by-laws, which provided that he should "make, sign, endorse and accept for and in the name and behalf of the company, promissory notes, drafts and checks in the regular course of its business." Had these been notes of a treasurer, elected by the shareholders and not a trustee, it would be clear that the shareholders would be liable for his acts as partners. The issue is confused by the fact that the report of this case refers to two documents, one a declaration of trust, the other by-laws, but nowhere explains the relation between the two. This is probably due to the fact that the original papers in the case disclose no express allegation or finding on this point. From an examination of the by-laws themselves which are printed in full in the Appendix,¹¹ it is plain, however, that the by-laws were the by-laws of the trustees and not of the shareholders and that the treasurer was an agent of the trustees and a member of the Executive Board appointed by the trustees, so that although the by-laws authorized him to sign notes on behalf of the "Company," this must be deemed the trade name of the

¹¹ See p. 363.

trustees whose agent he was and not of the shareholders.

The statement that the organization was a partnership, therefore, must be sustained if at all by reason of the provisions in the declaration of trust which is printed in full in the Appendix.¹² The provisions referred to by the court are (1) the power to remove trustees at any time without cause and fill the vacancies; (2) power to end the trust at any time; (3) power to amend the declaration of trust at any time. There was apparently no provision for stated election of trustees.

In determining whether mere power to elect trustees gives the right to control which makes the trustees agents of a partnership, we must first consider a little more carefully what is meant by right to control. This phrase has been used to define another distinction, that between the relation of principal and agent and that of independent contractors in the "loaned servant" cases. As there set forth, the relation is that of agency if the employer has a right not merely to have certain results accomplished but the right to direct in detail the method by which such results are to be attained.

"In determining whether in a particular act, he is the servant of the original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as proprietor so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result. Is this person the proprietor of the business in which the act is done? By this is meant not merely the

¹² See p. 367.

general business which the act is intended to promote, but the particular business which calls for the act, in the smallest subdivision that can be made of the business in reference to control and proprietorship.”¹³

In an ordinary partnership it is clear that each partner has such a right to direct the agents of the firm except that in cases of dispute the will of the majority prevails. In associations, by agreement, the shareholders always act by a majority vote. If this test is to be applied in the same sense in defining the distinction between partnership and trust, it would follow that only those associations are partnerships in which the shareholders have the right at any time to direct the conduct of the business by the trustees in matters of detail, a right not enjoyed by stockholders in corporations. In some deeds of trust such power has been affirmatively given to the shareholders.¹⁴ In most of them it has not been expressly given. Can the existence of the power be implied from the express power to elect at stated intervals the trustees of the association? If we are applying by analogy the distinction between agency and independent contract the answer must be no, for this is no more than the right of any proprietor to select his own independent contractor for each specific job. The right to remove a trustee during his term without cause would not ordinarily be a right possessed by the proprietor in dealing with his independent contractor, but might exist by express agreement between them and still would not change their relation, while it existed, from that of independent contractors

¹³ *Shepard v. Jacobs*, 204 Mass. 110, 112, 90 N. E. 392.

¹⁴ *Hart v. Seymour*, 147 Ill. 598, 609, 35 N. E. 246. See Declaration of Trust of the Copley Square Trust construed in *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808, printed in the Appendix at p. 333.

to that of principal and agent. The following cases on what is popularly known as "stock control" of corporations are of interest in this connection.

An action was brought on a contract by a railroad company to haul plaintiff's cars over all lines of its road and over all roads which it then controlled or might thereafter control by ownership, or lease or otherwise. The Supreme Court of the United States held that the defendant was not bound to haul cars over a road of which the defendant owned nearly all the stock.

"We are also of opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old were that company still in existence and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers and makes its own bargains. The Missouri Pacific owns all, or nearly all its stock, and in that way can determine who shall constitute its board of directors, but there the power of that company over the management stops. The board when elected has controlling authority, and for its doing is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific.

X "It is true the bill avers in many places and in many ways that the purchase of the stock of the St. Louis, Iron Mountain and Southern Company was made by the Missouri Pacific Company for the purpose and with the intent of getting the control of the road of the St. Louis, Iron Mountain and Southern, and that the case is before us on demurrer to the bill. A demurrer admits all facts stated in the bill which are well pleaded, but not necessarily all statements of conclusions of law. What was actually done is stated clearly and distinctly. The effect of what was done is a question of law, not of fact. It is a matter of no importance what the purpose of the parties was if what they did was not sufficient in law to accomplish what they wanted. When there is doubt, the purpose and intention of the parties may sometimes aid in explaining what was done, but here there is no need of explanation. The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and

these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property.”¹⁵

This case was cited with approval in the following dictum: “The mere fact that Crawford owned a majority of the stock did not give him the legal control of the company; nor from such ownership can the legal inference be drawn that he dominated the board of directors.”¹⁶

In a case which held that a railroad company was not doing business in the State merely because it owned practically the entire capital of a railroad which did do business there, the court said:

“Is it true that the Gulf Company was the agent of the Pacific Company or its mere creature in such a sense that to serve it is equivalent to serving the controlling company? It is a fact that both companies had common agents and employees to a certain extent, but the record shows that such employees were paid in proportion to the business done for each company. And that while in the service of the companies respec-

¹⁵ *Pullman Car Co. v. Missouri Pacific Ry. Co.*, 115 U. S. 587, 596, 29 L. ed. 499, 6 S. Ct. 194.

¹⁶ *Porter v. Pittsburg Co.*, 120 U. S. 649, 670, 30 L. ed. 830, 7 S. Ct. 741.

tively they were under the exclusive management and control of the company in whose service they were engaged, with no power to discharge or employ, the one company for the other; and that, although the service was in a sense common, it was kept distinct and separate in the control and payment of the employees while in the separate service of the respective companies.

“It is true that the Pacific Company practically owns the controlling stock in the Gulf Company, and that both companies constitute elements of the Rock Island System. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific Company the power to control the road by the election of the directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; but this power does not make it the company transacting the local business.

“This record discloses that the officers and agents of the Gulf Company control its management. The fact that the Pacific Company owns the controlling amounts of the stock of the Gulf Company and has thus the power to change the management does not give it present control of the corporate property and business.”¹⁷

We are, nevertheless, conscious that as a practical matter the power to elect the trustees at stated intervals and especially the power to remove them without cause give real control of the conduct of the enterprise just as

¹⁷ *Peterson v. Chicago, etc. Ry. Co.*, 205 U. S. 364, 390, 51 L. ed. 841, 27 S. Ct. 513.

a majority of shares in a corporation give practical control of its policy, though the directors of a corporation are not strictly agents of the shareholders. This suggests that perhaps there is some defect in our definition. Frequently in the development of the law of partnership, the courts, in their efforts to define the relation in the terms of other relations, have mistaken effect for cause. In the famous case of *Cox v. Hickman*¹⁸ the agency of the partners was declared the fundamental test of the relation of partnership when, indeed, it was only a legal consequence from the existence of that relation. Here again we are in danger of a like error. The power to direct and control in partnership is a legal consequence of the proprietorship of the business by the partners. It is an element to be considered with others in helping us to decide whether that proprietorship exists or not, but is not itself the final test. This is the essence of Judge Loring's distinction.

Trustees, not their beneficiaries, are proprietors of their business enterprises. Corporations, not their shareholders, are proprietors of the corporate business. In the present state of the common law we must say that the partners as individuals, but jointly, are proprietors of the business of an ordinary partnership. The trustees of the organizations we are now considering are in this sense the proprietors of the property of the organization. This at least creates a presumption that they are proprietors of its business enterprise. The power to change trustees at stated intervals or to fill vacancies as they occur should not, it is submitted, be deemed sufficient to transfer that proprietorship to the shareholders. It is not inconceivable that a trust under

¹⁸ 8 H. L. C. 268.

a will might provide expressly for the designation of future trustees by the beneficiaries, as they do now in effect. It is still plainer that the power to fill vacancies as they occur, but not at stated intervals, is not sufficient evidence of proprietorship to create a partnership. This was the extent of the power in the deed in question in *Smith v. Anderson* where it was held a trust.¹⁹ The power to remove at any time without cause and to fill vacancies seems, however, of a totally different sort. It is difficult to conceive of independent action by a trustee under such circumstances and absurd to say that he is the proprietor of the enterprise even while his incumbency continues. On this view the decision in *Frost v. Thompson*, *supra*, is justified.

The power to amend the declaration of trust has been emphasized as proving the existence of the power to control and, therefore, of partnership. If the instrument would otherwise be deemed to create a trust, it cannot be that the mere power to change the instrument makes it before such change a partnership. The right to change a trust into a partnership presupposes that until that change it remains a trust. This common provision in the instruments we are considering is, therefore, of no value in determining their true classification.

The real cause of difficulty in this problem is due to a conflict between the natural desire of courts to effectuate the honest intent of business men and the assumed necessity of applying to a problem *sui generis* analogies from other fields of the law. The very difficulty of securely placing these associations in the domain of either partnership or trust suggests that they may be-

¹⁹ 15 Ch. D. 247, 284.

long in neither. In dealing with corporations the peculiarities of the situation have been recognized by the courts and a new relation has been created that of director and stockholder and the rights and duties of this relation have become a body of law by themselves. May it not be that the true solution of the problem now under consideration lies in the recognition by the courts of the association as an organization intermediate between partnership and corporation and distinct from pure trusts with its own rights and obligations? If this conception were approved these preliminary problems of identification would be eliminated and we could approach the succeeding problems, such as the liability of shareholders, in the light of the real intent of the parties, and arrive at a satisfactory solution.

The dictum of Judge Loring in *Williams v. Milton* that the organization before the court in *Williams v. Johnson* ²⁰ was a trust and not a partnership, though the court in that decision said that it was a partnership, makes it desirable to examine in some detail the terms of the deed of trust involved in *Williams v. Johnson*. The original papers on file in that case show that although the deed of trust contemplated meetings of the shareholders, the provisions for that purpose were unusually meagre and apparently the shareholders possessed no control over the trustees. The only definite provision for meetings was contained in Section 22 of the deed of trust and is as follows:

“Meetings of the shareholders may be called by any one of the trustees and shall be called upon the written request of five or more shareholders. Additional

²⁰ 208 Mass. 544, 95 N. E. 90. See note 2 of this section.

powers may be created in the trustees at any meeting of the shareholders by a vote or resolution of the holders of at least two-thirds of the shares then outstanding; provided that notice of the proposed addition to such powers shall have been given in the call for the meeting and that the same is not inconsistent with the acquired rights of third parties."

In Section 23 it was provided: "At all meetings of shareholders each share shall be entitled to one vote and absent shareholders may vote by proxy authorized by a writing dated and executed within six months previous to the meeting at which it is used." There were in other sections certain provisions for notice to shareholders of the calling of meetings and other acts of the trustees. It was also provided that the division of net income should be discretionary with the trustees except that in any year when the net income exceeded two per cent. of the par value of the outstanding shares the trustees should divide among the shareholders three-fourths of that net income. In describing the powers of the trustees it was provided: "The trustees shall have the absolute control over and disposal of all real estate and other property held by them at any time under this trust." The powers of the trustees were not as broad as in some other deeds of this sort but included the power to acquire other real estate in the vicinity and "securities of any corporation, association or real estate trust organized for the purpose of acquiring, holding, managing or improving real estate, or for the purpose of conducting a lighting, heating, power or other business directly related to the management of real estate, if in their judgment such acquisition will in any manner tend to facilitate the laying

out, development, management or improvement of the real estate this day conveyed to them.”

These stipulations apparently gave the shareholders no control whatever over the trustees and although they had the right of association it would seem that they could vote only to increase the powers of the trustees. It is this, doubtless, which Judge Loring had in mind in declaring that the organization was a trust and not a partnership. On the other hand, the section relating to the nature of the shareholders' interest seems consistent only with the conception of a partner's interest in the partnership property and not with that of the beneficiary in a trust estate.

“§ 2. The shareholders are not to have any legal title to the trust property itself real or personal, held from time to time by the trustees and in especial, they shall have no right to call for any partition; they shall have no equitable estate in the lands and appurtenances thereto belonging constituting the trust property, but their interest shall consist only of an interest in the money to arise from the sale or other disposition thereof by the trustees, as herein provided, and of the rights herein mentioned previously to such sale, and the shares shall be personal property carrying the rights, as herein set forth, of division of proceeds and profits and the other rights and matters concerning the trust property and shall be transmissible and transferable as personal estate.”

The distinction between trust and partnership has been recognized in other States.²¹

²¹ An English investment trust formed to buy United States municipal bonds. Held: “The trust was not a corporation or joint stock company or partnership, but a trust formed by deed of settlement for the purpose of securing investments. The trustees were the legal

§ 15. Declaration of Intention

In all agreements on the border line of partnership, the parties endeavor to escape liability as partners by declaring their intention not to be partners. It is well settled in the law of partnership that such declaration of intention is not conclusive.¹ As Judge Loring said of such a declaration, "It is what the parties did in making the trust indenture that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did."²

§ 16. Unincorporated Companies under the Bankruptcy Act

A recent case in the United States District Court for the District of Massachusetts¹ deals indirectly with the problem. The organization in question was unusual in form. Certificates had been issued by the trustee of a real estate trust which were a cross between bond and stock and carried most attenuated rights of association. The issue before the court was whether the "Associated Trust" was an "unincorporated company" within the meaning of the United States Bankruptcy Law, and so subject to involuntary bankruptcy. The owners of the trust property and the business of the trust was managed by them and 'the committee' created by the deed for the benefit of the certificate holders, who were strangers to each other and who entered into no contract between themselves nor with any trustee on behalf of each other and were not therefore partners." *Johnson v. Lewis*, 6 Fed. 27 (C. C. — Ark.).

On the other hand a real estate trust formed in Massachusetts to deal in land in Iowa was held a partnership in courts of the latter. *Mallory v. Russell*, 71 Ia. 63, 66, 32 N. W. 102.

¹ *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785.

² *Williams v. Milton*, 215 Mass. 1, 12, 102 N. E. 355.

¹ *In re The Associated Trust*, 222 Fed. 1012 (D. C. — Mass.).

nature of this organization is best defined in the language of Judge Morton:

“The character of the respondent is to be gathered from the trust deed. Under it, the trustee declared that he would take and hold in trust money paid to him by other persons to the amount of One Million Dollars, for which he would issue transferable certificates having a face value of One Hundred Dollars, entitled to interest, and to participate in surplus earnings, and also entitled to borrow from the Trust sixty per cent. of the face value of the certificate, and after five years to receive from the Trust in cash the face value of the certificate upon the surrender thereof. The trustee is given very broad powers as to the management of the property in which the trust funds are invested, with the right to determine what part of the income shall be divided and what shall be retained as surplus. He has no power to bind any of the certificate-holders; and they have no power to interfere directly in the management of the property, and no title to it. A ‘Board of Directors’ is provided for, who may be appointed by the trustee and are removable by him; their duties are merely to advise the trustee; they are negligible as to the question here raised. Up to this point there would seem to be nothing in the organization differentiating it under the Massachusetts decisions from what may be called an ordinary trust; that is, the beneficiaries, cestuis, or certificate-holders (whichever they may be called) have no interest in the trust property and no right to joint action for control of it. They are in substance like beneficiaries in a trust under a will. There is no organization having a distinct entity apart from the trustee.

“But the declaration of trust also provides that if the trustee resigns, the certificate-holders may, at a meeting called for the purpose, elect a new trustee (Par. 16); that vacancies in the trusteeship may be filled by election by a majority vote of the certificate-holders at meetings duly called (Par. 17); that at such meetings a majority of the outstanding shares shall constitute a quorum, and that each share shall be entitled to one vote which may be cast by proxy (Par. 29); that upon notice in the manner provided special meetings of the certificate-holders may be called by the trustee and shall be called on written application of three or more certificate-holders having not less than twenty per cent. of the outstanding shares (Pars. 28, 31, 32); that the certificate-holders by a three-quarters vote of the outstanding shares may determine the trust (Par. 33), increase the number of shares and amend the declaration of trust (Par. 36).

“It thus appears (1) that the respondent has a capital contributed by the certificate-holders. (2) That future managers are to be chosen by the certificate-holders. (3) That the character, scope and size of the enterprise may be changed by the certificate-holders, and that it may be terminated by them. (4) That these rights and powers are given to the certificate-holders in the instrument by which The Associated Trust is constituted.

“The absolute powers of termination and amendment give the certificate-holders, as it seems to me, the ultimate control of the business of the trust whenever they choose to take that power into their hands. They have not yet done so, but the character of the organization is to be gauged rather by the powers of the

certificate-holders, than by the extent to which those powers have as yet been exercised. The analogy between the respondent organization and a corporation is apparent. The certificate-holders clearly possess many of the most characteristic powers of stockholders. If the expression 'unincorporated company' in the Bankruptcy Act does not describe such an organization as the respondent, it is difficult to see what meaning can be given to those words. To hold the respondent a partnership within the Bankruptcy Act would lead to results never contemplated by anybody, and would impose upon the certificate-holders obligations which neither they nor the creditors of the Trust supposed existed. It would be a very unjust result. To hold that the respondent is not an organization and is nothing more than a strict trust, is almost as far from the fact as to hold it to be a partnership. These certificate-holders voluntarily entered into a business organization, in which they invested their money under a contract by which they acquired certain individual rights against the trustee, and certain other rights to be exercised by joint action of all the certificate-holders. 'Unincorporated company' seems to me exactly to describe what the respondent is. *In re Seaboard Fire Underwriters*, 137 F. R. 987.

"I therefore am obliged to hold that the plea and the motions to dismiss contained in the answer cannot be sustained, and that the respondent is subject to adjudication."

Though this case decides merely that the trust was an "unincorporated" company within the language of a Federal statute, a conclusion to which no exception

can be taken,² it implies that the law should recognize such an organization as a distinct entity intermediate between the corporation on the one hand and the partnership and the trust on the other.³ It might be argued, however, that the reasoning of the court with reference to the effect of the provisions for election of trustees and termination of the trust would bring this trust within Judge Loring's definition of partnership because the court found both elements of association and control. The answer of the court that this would lead to results never contemplated by anybody is equally true of many partnership cases where the parties involved did not appreciate the legal consequences of their acts. It should also be noted that in this case counsel on both sides expressly disclaimed any contention that the Associated Trust was a partnership. If the view above suggested is sound, however, the organization in question was merely a trust.

§ 17. Association for Profit Distinguished from Tenancies in Common

Another possible line of distinction in determining whether or not shareholders in these organizations have incurred the liabilities of partners is that between partners and tenants in common. This is one of the most familiar tests of partnership and in close cases one of the most difficult to apply. It is plain that mere joint ownership of property does not make the co-owners partners.¹ It is an incident of ownership that the owner may derive income from his investment. So the mere

² See *Re Seaboard Fire Underwriters*, 137 Fed. 987 (D. C. — N. Y.).

³ See § 12, note 5.

¹ *Fall River Whaling Co. v. Borden*, 10 Cush. 458 (Mass.).

fact that tenants in common jointly gain by their investment either by increment to its capital value or by way of interest or rent does not make them partners. Partnerships came into the common law as organizations engaged in buying and selling personal property. The rights and limitations of joint tenancy of real estate had become fixed long before. Hence there is still the element of trade implied in partnership, although it has long since ceased to be limited to the business of buying and selling merchandise. It may apply equally well to trading in real estate,² and Lord Cockburn said that joint owners of a horse might become partners in the use of the horse if they made a business of racing him for money prizes.³ Just where the line is to be drawn in complicated states of fact between deriving an income from property owned jointly and making a profit out of the use of that property in business it is as yet difficult to state, but that there is a valid distinction between the two kinds of relation to property we all recognize and it is established law.⁴

² *Fall River Whaling Co. v. Borden*, 10 Cush. 458 (Mass.).

³ *French v. Styring*, 2 C. B. N. S. 357; see also *Goell v. Morse*, 126 Mass. 480.

⁴ Early Hudson River steamboat company held tenants in common and not partners. *Livingston v. Lynch*, 4 Johns. Ch. 573, 592. Subscribers to an unincorporated telegraph company were held tenants in common and not partners. Such a decision would hardly be expected to-day if it were a commercial telegraph company. *Irvine v. Forbes*, 11 Barb. 587, 589. But see modern cases on "farmers" telephone lines." § 54, note 8.

Proprietors of a grist mill were held tenants in common. *Buck v. Spofford*, 31 Me. 34.

A group contributed in equal shares to buy a vessel and cargo and send both to California to be sold by an agent. Defendants were sued on notes given by the agent in payment for cargo. Notes in name of agent. Held: Liable whether partners or not on principles of agency. Dictum that tenants in common and not partners. *French v. Price*, 24 Pick. 13, 20.

Numerous heirs and devisees of three original proprietors of a ferry continued to operate it. Petition for partition dismissed and cause

The law of mining partnerships, as the exception has been developed in the mining states, affords an example on the border line between tenancies in common and partnerships. Co-owners of a mining claim are tenants in common just like tenants in common of any other real estate. When they begin to work it and enter into the business of producing ore and selling it for profit they, of course, become partners. As the law has been stated, and is now set forth in the codes, the operation of the mine constitutes a "mining partnership" between the owners who join in working it.⁵ Those who do not join retain the relation of tenants

remanded for an accounting and dissolution of partnership. *Bogardus v. Reed*, 145 N. Y. S. 597, 160 App. Div. 294.

⁵ Where an agent locates a placer claim and later agent and principal without any contract engage in working it they become mining partners in the work of mining but not in the ownership of the ground. *M'Mahon v. Meehan*, 2 Alaska 278, 286.

On a bill for specific performance of a contract held it did not create a mining partnership because there was no allegation that the defendant actually engaged in working the mines. *Marks v. Gates*, 2 Alaska 519, 523.

The holder of a claim to coal-bearing land agreed with two others to prospect at their own expense for a ledge, after which all three were to jointly work the ledge. Held: This did not create a relation of landlord and tenant but tenants in common or partners in mining and therefore the plaintiff had mistaken his remedy. *Henderson v. Allen*, 23 Cal. 519, 521.

Tenants in common of a mine who join in working it without formal agreement are a mining partnership which is not founded on the *delectus personae*, but shares are assignable and assignment of shares or death of shareholder do not produce dissolution. Hence members have limited authority to bind the others and it would not include authority to employ an attorney to prosecute claims. *Charles v. Eshleman*, 5 Col. 107, 111.

An agreement by one to furnish services and others money for working a mine constitutes a mining partnership. The members are liable for labor employed in the work. *Lyman v. Schwartz*, 13 Col. App. 318, 321, 57 Pac. 735.

"In order to create a mining partnership it seems to be necessary that there be an agreement to work the mine for the joint profit of the parties. Otherwise the owners of the property acquired in such manner as is here charged are tenants in common." "Indeed it seems to be held that the mere use of property so obtained for partnership pur-

in common.⁶ The partnership may include others than the tenants in common of the mine.⁷ A smelting firm has been held a "mining partnership."⁸ In applying the doctrine to oil drilling,⁹ it has been held that the co-tenants became partners even where they divided the product in specie.¹⁰ An attempt has been

poses does not convert it into partnership assets in the absence of an agreement to make it partnership property." *Doyle v. Burns*, 123 Ia. 488, 495, 99 N. W. 195.

Cessation of work amounts *ipso facto* to a dissolution of a mining partnership formed under the statute merely by operation, but a temporary discontinuance will not. *Nielson v. Gross*, 17 Cal. App. 74, 118 Pac. 725.

A mere prospecting or "grub stake" contract is not a mining partnership and the contractors do not become partners until they discover and actually work a mine. Hence the defendants were not liable for supplies furnished the prospector. *Hartney v. Gosling*, 10 Wyo. 346, 358, 68 Pac. 1118.

A miner's agreement referred to "prospecting partners" of the discoverers of a claim. Held that those who furnished money and provisions to the prospectors to enable them to search for gold were meant though they might not technically be partners. *Boucher v. Mulverhill*, 1 Mont. 306, 310.

⁶ *Mader v. Norman*, 13 Idaho 585, 590, 92 Pac. 572; *Anaconda Co. v. Butte Co.*, 17 Mont. 519, 43 Pac. 924; see *First Bank v. G. B. V. Co.*, 89 Fed. 449 (D. C. — Idaho). So of operation by one tenant in common under a deed of trust. *Peterson v. Beggs*, 148 Pac. 541 (Cal.).

⁷ A partnership was held to exist within the rule of *Meehan v. Valentine*, 145 U. S. 611, 36 L. ed. 835, 12 S. Ct. 972, to operate a mine. It was said to be clearly a mining partnership under the special rule. It was not necessary that all should have had an interest in the mining lease if interested in the operating. The special rules are set forth on p. 413. Hence defendants were liable for labor claims. *Bentley v. Brossard*, 33 Utah 396, 411, 94 Pac. 736.

⁸ An association to operate a smelter and mines is a mining partnership. Review of rules as to such. Superintendent can bind members on a contract for charcoal for use in the smelter. *Higgins v. Armstrong*, 9 Col. 38, 46, 10 Pac. 232.

⁹ Shareholders in a corporation who bought its oil leases on a wind-up and operated them and divided the net profits were held a mining partnership. The rule that mere operation creates it was stated. *Kirchner v. Smith*, 61 W. Va. 434, 444, 58 S. E. 614.

¹⁰ Oil miners who divided the oil in specie by receiving separate certificates for the share of each from the pipe line company were held mining partners under the theory that mere operation of a mine by co-owners made them such, citing the cases under Western codes without mentioning the latter. The general rules distinguishing mining part-

made to extend the doctrine of mining partnerships to proprietors of irrigation ditches, but the courts seem uncertain of their ground.¹¹

The application of the distinction between tenancies in common and partnerships to organizations formed under deeds of trust will arise in two different kinds of enterprise. One of the most common of these associations is that formed for the purpose of constructing and owning large office buildings or hotels in cities. It is hard to see why a distinction should be made between two men who jointly own an office building and derive a profit from their rentals less their expenses and two hundred men who hold transferable shares in a trust which owns a similar building. Yet as great a lawyer as Jessel, M.R., seems to have thought such a distinction valid.

“There are many things which in common colloquial English would not be called a business even when carried on by a single person which would be so called when carried on by a number of persons. This is a distinction not to be forgotten even if we were trying the question by ordinary use of the English language. For instance, a man who is the owner of offices, that is, of a house divided into several floors and used for commercial purposes are laid down. *Childers v. Neely*, 47 W. Va. 70, 72, 34 S. E. 828.

Tenants in common of an oil lease dividing the oil between them were held partners and it was said that the rules of mining partnership applied and that the shares were freely transferable. *Ervin v. Masterman*, 16 Ohio Cir. Ct. 62, 70.

¹¹ Tenants in common of a water ditch selling water may be regarded as partners. One tenant allowed to recover from another his share in profits received from sales of water. *Abel v. Love*, 17 Cal. 233, 237.

Owners of shares in irrigation ditch held tenants in common and not partners because shares freely salable. *Bradley v. Harkness*, 26 Cal. 69, 77. A later case says they are like mining partnerships. *McConnell v. Denver*, 35 Cal. 365.

cial purposes, would not be said to carry on a business because he let the offices as such; but suppose a company was formed for the purpose of buying a building or leasing a house to be divided into offices and to be let out, should we not say if that was the object of the company that the company was carrying on business for the purpose of letting offices or was an office letting company, trying it by the use of ordinary colloquial language. . . ."

"When you come to an association or company formed for a purpose, you say at once that it is a business because there you have that from which you would infer continuity."¹² It must of course be remembered that the Master of the Rolls was not deciding the direct question of partnership or not, but whether there were persons associated for the purpose of carrying on a business within the meaning of a certain statute.

A joint stock company or association was formed to buy a tract of land, sell lots until all costs and expenses were paid and then divide the balance of the land among the shareholders. It was held by the Supreme Court of the United States to be a partnership.¹³ It has been held in Massachusetts, that a real estate trust formed for the purpose of erecting a hotel and leasing it was taxable in Boston as a partnership. The

¹² *Smith v. Anderson*, L. R. 15 Ch. D. 247, 259, 273. (The decision of the Master of the Rolls was reversed on appeal. See § 18, note 1, especially the opinion of Cotton, L.J.)

Owning and renting an office building was held "doing business" within the meaning of the Federal Corporation Tax of 1909. *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 55 L. ed. 428, 31 S. Ct. 361.

¹³ *Clagett v. Kilbourne*, 66 U. S. 346, 349, 17 L. ed. 494.

A similar organization with transferable shares was assumed to be a partnership in *Merchants National Bank v. Wehrmann*, 202 U. S. 295, 300, 50 L. ed. 1036, 26 S. Ct. 613.

court said: "There is no doubt that they are joint owners of property for whose benefit the business is being carried on, in which profits or loss will affect them all proportionally through the increase or diminution of the value of their respective interests in the trust. In the leading and substantial features that distinguish an ordinary partnership this association is within the spirit and meaning of the law of partnership. The limitations upon the power and liability of individual members and the attempt to avail themselves of many of the privileges of stockholders in corporations relate more to details and to the machinery of management than to the substantive purpose of the enterprise."¹⁴ This case Judge Loring approved in the opinion above quoted, but on the ground that the original papers showed that the shareholders had the right to instruct and remove their trustees, amend the declaration of trust or direct the trustees to sell the property and distribute the proceeds. He also notes that the declared purpose of the trust was "the purchase, development and disposition of" certain real estate.¹⁵ In drawing these declarations of trust, lawyers have been prone to expand and multiply the declared purposes of the trust and the powers of the trustees in imitation of the common practice in drawing charters of corporations. In many instances it will be found, therefore, that the

¹⁴ *Williams v. Boston*, 208 Mass. 497, 500, 94 N. E. 808.

Bill to redeem from sale under attachment certain lots sold by a real estate trust. It was contended that the real estate trust was invalid. It was an association with power to direct and control. Held: The trust was not executed by the statute of uses. The beneficiary was a partnership (p. 610) of determinable members capable of taking and the trustees were active (p. 611). The power of shareholders to remove trustees does not affect their legal title till exercised (p. 613). Not a perpetuity because lots immediately salable. No restraint on alienation (p. 614). *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246.

¹⁵ *Williams v. Milton*, 215 Mass. 1, 7, 102 N. E. 355.

scope of the enterprise as set forth in the instrument under which it is organized includes that which is clearly appropriate to a partnership even though the specific purpose the shareholders contemplate and in fact undertake may be more properly described as a mere investment.

§ 18. Holding Companies

Such organizations as are above described are now frequently formed to serve as holding companies in consolidating numerous public service corporations, and in view of the present trend of legislation this use of unincorporated associations seems likely to be extended. The specific object of such organizations is to acquire and hold shares of stock in certain classes of corporations and after paying the slight expenses of the association to redistribute in dividends to its shareholders the dividends and interest received from the shares of stock and bonds it owns. This in itself seems merely an investment rather than a business and was so held in *Smith v. Anderson*.¹ Lord Justice Brett said: "I confess I have some difficulty in seeing how there could be an association for the purpose of carrying on a business which could be neither a company nor a partnership, but I should hesitate to say that, by the ingenuity of men of business, there might not some day be formed a relation among twenty persons which, without being strictly either a company or a partnership, might yet be an association.

"Where it is a joint stock company, or a corporation, or *quasi* corporation, and the individuals are mere shareholders, then the gain which is acquired by the

¹ L. R. 15 Ch. D. 247, 274.

business is a gain by the company, and not a gain by the individual shareholders. But where it is an ordinary partnership, or where it is an association which, not being a joint stock company or corporation, is more like to a partnership, there the gain will not be by the whole body as distinct from the individuals, but by the individual partners.

“Let us now consider whether in the present case there were any persons associated for the purpose of carrying on any business such as is described in this clause. If there were such persons, they must have been either the trustees or the certificate-holders. In my opinion neither the one nor the other were associated together for the purpose of carrying on such a business as is described in the act. I will take first the trustees themselves. The trustees were not, as I construe the deed, to enter upon a series of acts which, if successful, would obtain a gain. They were joined together for the purpose of once for all investing certain money which was delivered into their hands, and not for the purpose of obtaining gain from a repetition of investments. In other words, they were not associated together for the purpose of speculating in shares. That was not their business. There was no reason why, when they had once made an investment, it should, under ordinary circumstances, ever be changed. Therefore it seems to me that the primary and substantial object of their associating together was not for the purpose of carrying on a business which, if successful, would result in the acquisition of gain.

“But supposing that this was such a business as is mentioned in the act, were the certificate-holders the persons who were to carry it on? It seems to me that

they certainly were not. I take it that the persons called trustees in the deed are clearly trustees as distinguished from agents and from directors. The distinction has been pointed out by my Lord, and I entirely agree with it. If, indeed, although they were called trustees, the duties which they had to perform were really those of directors, then, although they were called trustees, the legal effect of the deed would be that they would be directors, and if they are directors they are agents; but here it seems to me clear that according to the true construction of the deed they were not directors or agents, but trustees. If that be so, the certificate-holders, even if they were associated at all, were not associated for carrying on the business. It was not their business. They could not have been made liable for any contract made by the trustees. It was of course urged that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts upon which they are to be liable are their agents authorized to bind them by their contracts, which is obviously not true. Therefore, even if there be here a business within the meaning of the section, yet it is not carried on by the certificate-holders, who are of a larger number than twenty, but by the trustees, who are not of the number of twenty or more; and therefore in either view the case is not within the statute."

Lord Justice Cotton said: "If it appeared that the real object of the deed was that the trustees should speculate in investments, even though confined to this particular class, the case would have stood in a very different position. In my opinion there is nothing of that sort. This is not a provision that they shall make

a profit by selling and buying again securities of this class, whenever, in their opinion, the turn of the market makes it advisable so to do. The deed is in substance a trust deed, providing how they are to hold as trustees specified securities of a large amount with provisions enabling them in certain events to sell some of the securities, and enabling them when that is done, but only under special circumstances, to reinvest, not to speculate. In my opinion that is not a deed providing for carrying on a business within the meaning of the act; it is a deed providing for the holding of trust property with such provisions only as are necessary to enable that to be conveniently done. I am of opinion, therefore, that there is no carrying on business within the meaning of the act."

The power to sell as well as to buy these securities is ordinarily so essential to the effective operation of one of these holding companies that in most instances it will be found that the declaration of trust contains a trading element.² If the organization is a partnership, any increase in the value of the securities comprised in the trust fund is a profit to be divided among those entitled to profits; if a trust, it is an accretion to principal and belongs to those who own the corpus of the trust fund.³

§ 19. Application of Law of Partnership to Associations for Profit

Not only is there doubt as to the exact definition of those associations operating under deeds of trust that are partnerships, but there are many questions still to

² See § 34, note 1.

³ *Williams v. Milton*, 215 Mass. 1, 11, 102 N. E. 355.

be settled regarding the effect of the provisions by which these documents purport to modify the usual rules of partnership.

In the absence of any such stipulation in the articles of organization, constitution and by-laws or deed of trust, whichever may have been made the mode of organization adopted, it is generally held, when once the court has determined that the particular association in question is a partnership, that the ordinary rules of the law of partnership apply. When, however, one modification is made, such, for example, as the usual provision for transferable shares, certain other modifications of the law of ordinary partnerships are generally implied.

§ 20. Membership in Informal Association for Profit

One who signs the constitution of an informal association for profit becomes a member from the date of signature.¹ New members were added to a joint stock association formed to publish a newspaper by the trustees signing an agreement to hold in trust for them as well as for the others.² In general, membership in an association is a question of fact for the jury.³ A wife

¹ Though his name was not voted on till later. *Beaman v. Whitney*, 20 Me. 413, 420. But signing a book and paying a dollar for membership in a coöperative store did not make defendants partners where there were several blank pages between the constitution and list of signatures without evidence of intent to subscribe to articles of partnership. *Moore v. May*, 117 Wis. 192, 94 N. W. 45.

Patrons of a cheese factory operated by a voluntary association do not necessarily become members of the association and therefore partners. *Coolidge v. Taylor*, 85 Vt. 39, 80 Atl. 1038, 1045.

² *Holt v. Blake*, 47 Me. 62.

³ Subscribers to shares in an express company who had paid assessments were held partners and so liable for its debts. *Frost v. Walker*, 60 Me. 468, 470; *contra*, it has been said that subscribing is merely a declaration of intention to become a partner. *Appeal of Hedge*, 63

of a shareholder, who herself held stock, was held not liable for debts of the association because a wife cannot be a partner with her husband.⁴

§ 21. Property Rights in Associations for Profit

The fact that the shareholder in associations organized under deeds of trust is a *cestui que trust* as well as a member of an association has caused doubt as to the nature of the shareholder's interest in the assets of the association. The uncertainty of the courts as to the line of distinction between pure trust and partnership has added to the confusion. The ordinary rule of partnership is that a partner individually owns no part in the legal or equitable title to the personal property of the firm but that the firm as an entity holds that title. The nature of the partner's interest is a chose in action, a right to an accounting and to receive his share in the net assets after payment of debts.¹ This rule has been applied in defining the nature of the interest of a shareholder in an association.

A joint stock company or association was formed to buy a tract of land, sell parts until all cost and expenses were paid, and then divide among the stockholders. Title was taken in name of trustees. A separate creditor of a shareholder got judgment and levied on the land, claiming a lien on his share. It was held that it

Pa. St. 273, 277; see also *Galveston City Co. v. Scott*, 42 Tex. 535, 553.

Shareholders of a joint stock company are liable as partners. If the company has engaged in the business for which it was formed, each subscriber for shares with the intent to share profits and each contributor to the funds is liable as a partner. So is one who takes part in meetings or acts as manager. *Hunnewell v. Willow Springs Co.*, 53 Mo. App. 245, 248.

⁴ *Norwood v. Francis*, 25 App. D. C. 463, 476.

¹ *Pratt v. McGuinness*, 173 Mass. 170, 172.

was a partnership and that a purchaser at an execution sale got the same interest as the debtor had, namely, a share in the net assets after an accounting, and that the remedy was to go into equity for an account.²

The legal title to partnership real estate is never in the firm as an entity but may be vested in the individual partners who hold in trust for the firm or in some express trustee for the firm. Unless by the form of conveyance a partner holds the legal title either alone or as tenant in common the English rule is that his interest before dissolution in the real estate held in trust for the firm is the same as his interest in the personal property.³ In most States in this country, for purposes of descent, it has been treated as realty subject to certain exceptions for the benefit of creditors.⁴ A contrary result was reached, however, in a case relating to a real estate trust formed in Massachusetts to deal in land in Iowa. The widow of a shareholder claimed dower in land conveyed by the trustee. The court said: "The enterprise was a partnership the object of which was to buy and sell real estate; and the interest of the individual members of the partnership was the proceeds of the sale of the land. The written contract expressly provides that the trustee shall be invested with the legal title of the land purchased and the same shall be sold and conveyed by him and a distribution of receipts from the land sales shall from time to time be made to the members of the association in proportion to their respective interests. It was not contemplated that there should at any time be any partition or division of the lands among the

² *Clagett v. Kilbourne*, 66 U. S. 346, 349, 17 L. ed. 494.

³ *Darby v. Darby*, 3 Drew. 495.

⁴ *Shearer v. Shearer*, 98 Mass. 107, 115.

members of the partnership, but the contract plainly provides that the lands shall be sold by the trustee and the proceeds divided among the several partners. Being partnership land, it must be treated as personal assets, not only so far as the rights of creditors of the partnership are involved, but, so far as necessary, for the purpose of carrying out the provisions of the partnership contract. It is plain to be seen that if the claim of plaintiff be well founded, a husband could not become a member of a partnership of this character without associating his wife with him as a member of the firm. It is not claimed that the contract of partnership is void. Contracts of partnership for buying and selling real estate as a business are as valid and binding upon the parties as any other legal contracts. The parties to this contract expressly provided that the title to the land should be held by a trustee and that he should sell and convey a clear and absolute title. The contract itself refutes the idea that persons who paid their money in aid of the enterprise became seised of any estate in the land. Their relation to the enterprise was very much like the relation of stockholders in a corporation to the property of the corporation." Hence the widow's claim was dismissed.⁵

⁵ *Mallory v. Russell*, 71 Ia. 63, 66, 32 N. W. 102. To the same effect are *Butterfield v. Beardsley*, 28 Mich. 412 (proceeds of oil lands); *Horner v. Meyers*, 29 Ohio Weekly Law Bulletin 403 (petition for partition of land refused); *Dillworth v. Ackley*, 1 Walk. 180 (Pa.) (bank). An attachment of shares in a real estate association gave no lien on the real estate. *Pittsburg Wagon Works Estate*, 204 Pa. St. 432, 54 Atl. 311.

Joint stock company to deal in real estate. Land is personal property belonging to the company collectively. Shareholder has only a contingent interest in profits and his attaching creditor can get no more. *Kramer v. Arthurs*, 7 Pa. St. 165, 172.

Proceeds of mining lands declared as a dividend was held income as between life tenant and remainderman. Shareholder's interest in

It has seldom been of importance to determine the exact nature of the interest of the *cestui que trust* in the

property said to be only a right to an accounting. *Oliver's Estate*, 136 Pa. St. 43, 20 Atl. 527.

"And while the association is not a creature of our statutes governing the formation and powers of corporations, but is organized and exists at common law, there is no ground for any distinction in the application of the principle announced in our decisions, that in whatever manner described or apportioned an addition to capital stock generally is treated as capital belonging to the remainderman and not to the life tenant. We are accordingly of opinion that there having been no fund which could be designated either as profits, undivided earnings or accumulated surplus sufficient to meet the disbursement necessary to discharge the arrearage, the issue of new shares must be deemed an addition to the outstanding capital of the association." *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171. See *Bisbee v. MacKay*, 215 Mass. 21, 102 N. E. 327.

In deciding that shares in real estate trusts, all the property of which and place of business and books where alone certificates could be transferred were within Massachusetts and the trustees of which lived there, are subject to the Massachusetts inheritance tax when the deceased owner was a resident of New York. Held: "It is not necessary to analyze with greater nicety the precise character of the property interest of a shareholder under each of the trusts. It is true of all of them that their rights are equitable interests in tangible property within this Commonwealth. While the legal title is in the trustees, their ownership is fiduciary and the certificate holders are the ultimate proprietors of the property, which is held and managed for their ultimate benefit and which must be divided among them at the termination of the trust. Their rights constitute not choses in action but a substantial property right. In this respect the case is indistinguishable in principle from shareholders in a domestic corporation. *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372. The fact that the certificates themselves were not within the Commonwealth is an immaterial circumstance." *Peabody v. Treasurer*, 215 Mass. 129, 102 N. E. 435.

When a purchaser of shares in an association pledges them to secure his purchase note and lets them stand on the books of the association in the name of the pledgee, the purchaser is the equitable owner of the shares. *Linnell v. Leon*, 206 Mass. 71, 91 N. E. 895.

Issue as to validity of oil mining claim. Whether development work done by a grantee of part of tract inured to benefit of that retained. Held: "A location made by an association of persons being but a single location and not eight separate locations is to be treated as an entirety under one location for all purposes of marking boundaries, doing assessment work, expenditure for patent, and discovery of oil and that but a single discovery is all that is required to support it." Hence work done by successor inured to their benefit. *Merced Oil Co. v. Patterson*, 162 Cal. 358, 122 Pac. 950.

But see a curious case where a joint stock company was formed to lay out a town and sell lots. Held: A purchaser of shares from an

trust *res*. The better opinion would seem to be that it is a chose in action, a right enforceable in equity by the beneficiary against the trustee. Courts have frequently treated it, however, as an equitable estate especially when the trust *res* is real estate.⁶ Modern tax laws are responsible for many cases, the decision of which has seemed to require consideration of abstruse problems which bear little resemblance to the constitutional and statutory questions usually involved in taxation. There have been several of importance to our subject.

A certificate for shares in a real estate trust was pledged in New Hampshire where the pledgee lived. The trustees lived and did business in Massachusetts. The real estate was in Massachusetts. The terms of the trust instrument are not given and the court did not consider the distinction between trust and partnership. The court said: "This property was a valuable interest in real estate in Cambridge, the legal title to which was held by trustees." "Although the testator held only an equitable interest in this real estate instead of a legal interest we perceive no difference in principle between the passing of this interest in succession and the passing of his interest under a mortgage held in like manner as security for a debt. We original subscriber cannot on the ground of fraud on the original subscriber claim to rescind and recover the original consideration. But a certificate that a holder was entitled to one share in certain property gives a claim in damages against the proprietors of the land who issued the certificates if the title to part of the land failed. *Wright v. Swayne*, 5 B. Mon. 441 (Ky.).

An organization to speculate in a town site, at first said to have been incorporated, but later (p. 49) declared to be a joint stock company or partnership, executed deeds by its officers as authorized by an irrevocable power of attorney from each stockholder and his wife. Hence title of all partners passed by these deeds. *Batty v. Adams County*, 16 Neb. 44, 51, 20 N. W. 15. See *Edwards v. Old Settlers Ass'n*, 166 S. W. 423, 426 (Tex.).

⁶ *Freedman's Co. v. Earle*, 110 U. S. 710.

are of opinion that all this property is subject to the tax upon succession prescribed by our law.”⁷

In another case it was held that whether the shareholders were *cestuis que trust* or partners their rights were equitable interests in tangible property within the State. “While the trustees hold the legal title, the certificate holders are the ultimate proprietors of the property which is held and managed for their benefit and which must be divided among them at the termination of the trust. Their rights constitute not choses in action but substantial property rights.”⁸

In another case it was decided that the words of a statute, “his estate found here” (which is to be administered according to Massachusetts law) includes not only stock in Massachusetts corporations but “shares in the Western Real Estate Trust.” “The trustees are resident in this Commonwealth and their home business office is here, where only can the certificates be transferred upon surrender and new certificates issued. The certificate-holder is at least the owner of an undivided equitable interest in the property held by the trustees. There is on principle in this respect no distinction between such certificate and a certificate for shares of stock in a domestic corporation.”⁹

An action was brought to recover a legacy tax collected by the United States under the War Tax of 1898 on certain shares in fifteen different real estate trusts. The issue was whether the interests of the shareholders in those trusts were real or personal. To the extent

⁷ *Kinney v. Treasurer*, 207 Mass. 368, 93 N. E. 586.

⁸ *Peabody v. Treasurer*, 215 Mass. 129, 102 N. E. 435.

⁹ *Kennedy v. Hodges*, 215 Mass. 112, 114, 102 N. E. 432. See *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372, and *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. (Decided September 15, 1915.)

that they were personal property they were taxable; if real estate they were not taxable. The plaintiff contended that to the extent that the property owned by the several trusts was real estate, the shares were equitable interests in real estate and the tax was illegally assessed. The trust deeds were of the common type but differed in many details, especially in the extent of power vested in the shareholders to control or direct by votes at meetings or by writings signed by certain proportions of them, the business to be done by the trustees, the amendment of the trust agreement, and the termination of the trust. All the agreements except one fixed a time when the trust should terminate, and in all of them a prescribed number of shareholders could terminate the trust by vote or writing at any time. The provisions as to a sale of the property on termination varied. In some the trustees had discretionary power to sell at any time without the consent of the shareholders; in others the trustees had that right with the consent of the shareholders; in others there was no provision for sale except on special authorization by the shareholders. One of the trusts had cash on hand at the time of the death of the shareholder, but was obligated in a larger amount to buy certain land. On the theory that equity will regard as done what ought to be done, the court ruled that it should treat that cash as real estate unless it had to be treated as personalty under the stipulations of the trust agreement to be considered later. In another trust which had cash on hand, there was a provision for a reserve fund but the court said that the reserve fund should come out of the gross income and would not effect the equitable conversion of the cash on hand into real estate for the purchase of

which it had been accumulated. The court held that the provision in most of the trust agreements for a final termination and distribution, whether imperative or discretionary, would not effect an equitable conversion of the property at the time of the death of the shareholder, because at that time the period for conversion had not arrived. None of the trust agreements contained an imperative direction to the trustees to sell the trust property during the life of the trust and the court therefore held that the real estate was not equitably converted into personal property upon the conclusion of the trust agreements or upon the death of the shareholder. It was contended that the provision that the shareholder should have no legal or equitable interest in the trust property indicated that the right of the shareholders was nothing but a chose in action, but the court pointed out that it had been held in Massachusetts that the shareholders' interest is not a mere chose in action but an equitable interest in the corpus of the trust, and the provision above referred to was not sufficient to change this rule, because in each of the trusts where it occurred the shareholders reserved either (a) the power to control the trustees in the sale and disposition of the property, to instruct, remove, replace trustees, amend and terminate the declaration of trust, and to order a conveyance to themselves; or (b) a right to authorize a sale or mortgage, to rebuild, to remove trustees, and to terminate the trust when the property shall be conveyed to the shareholders; or (c) to authorize sales, in which case the trustees were required to pay over the net proceeds, the right to mortgage and rebuild, remove trustees, terminate the trust, and having terminated it require a conveyance of

the property to the shareholders. "Under such circumstances it cannot reasonably be said that they have no right, title or interest in the property, and that their interest as shareholders is a mere chose in action." In a number of other trusts it was provided that the shares should be personal property. It was contended that this implied an imperative direction of the trustees to convert the real estate. The court said: "It is plain that the mere declaration of the creator of the trust that real estate, or equitable interest in real estate, shall be considered as personalty, will not give it that nature. You cannot impress upon real estate the character of descendibility according to the rules applicable to personal estate without directing the real estate to be sold." In these particular trusts, taking all their provisions into consideration, the court had no doubt that the power of sale intended to be vested in the trustees, if any, was discretionary. In two of the trusts the trust was to continue for twenty years unless sooner terminated, and the trustees were to improve, lease or sell the real estate subject to the control or direction of two-thirds of the shareholders, but with the power to act according to their discretion unless they had received instructions. The court said that this indicated that so far as they had any powers vested in them they were discretionary. "The provision for assignability of shares without complying with the formalities necessary for a conveyance of real estate does not make them personal property. They represent equitable interests in the corpus of the trust and their character is determined by the nature of the corpus and if the corpus is real estate it would seem that the transferability would depend upon the law governing the transfer of

interests in real estate in the place where the real estate was situated in the absence of legislative authority making special provision for their transfer." The court therefore held that to the extent that the corpus of the property was real estate or cash directed or agreed to be invested therein, the tax was illegal.¹⁰

If the dictum last quoted is sound, the transferability of shares in associations or trusts owning real estate becomes of little value. It is to be hoped that when the question comes before the courts for direct decision it will be held that the interest of the *cestui que trust* is a chose in action and that the right of a shareholder in an association or a trust owning real estate may be transferred without the formalities required of transfers of legal interests in real estate. The question may well be avoided, however, by proper provision in the deed of trust for an imperative conversion of the real estate into personality but to be postponed in the discretion of the trustee.

The assignee of a shareholder will take his share subject to the equity of his co-partners to have the property applied in payment of firm debts.¹¹ A pledgee of a certificate for shares gets rights superior to a creditor who attaches the undivided interest of the shareholder in the property of the association.¹² A deed

¹⁰ *Bartlett v. Gill*, 221 Fed. 476 (D. C. — Mass.).

¹¹ Sale of share in a mine. *Duryea v. Burt*, 28 Cal. 569, 577, 586.

¹² *Citizens' Bank v. Bank of Commerce*, 80 Kan. 205, 101 Pac. 1005.

A joint stock association was formed to develop timber lands. The trustee held three-quarters of the shares. He mortgaged his interest to a bank and then conveyed it to his brother. The documents suggest that the parties were trying to convey real estate and not shares, but the certificates were also delivered to the mortgagee. Held: Though this is a partnership the shareholder could mortgage his interest whatever that might be. The mortgage is valid and the conveyance to the

of land describing the grantee in its association name vests title in those who are ascertained to have been members of the association at the time, at least if the firm name does not contain the name of any individual partner.¹³ If the firm name does include the name of any partner some courts would hold that title vests in that partner in trust for the firm.¹⁴ An association can acquire by prescription a right of way over adjoining land of one of its members.¹⁵

§ 22. Powers of Members of Associations for Profit

The officers of such associations may be held to have implied power to bind it by their acts within the scope of the purposes of the association.¹ A curious exception

brother gave simply an equity of redemption. The rights of creditors do not intervene here. *Stringham v. Durkee*, 8 Wis. 1, 123, 126.

¹³ *Byam v. Bickford*, 140 Mass. 31, 32, 2 N. E. 687. In *Pomeroy v. Latting*, 2 Allen 221, a mortgage to "The Copake Iron Works" was foreclosed by a writ of entry brought by the individuals who composed a firm of that name.

Though a "deed to an unincorporated company and their successors might be void" on ground of uncertainty a deed to trustees and their successors in trust for the stockholders and their heirs in proportion to the stock owned by each would be enforced. *Natchez v. Minor*, 17 Miss. 544.

¹⁴ *Beaman v. Whitney*, 20 Me. 413, 420.

¹⁵ *Bradley Fish Co. v. Dudley*, 37 Conn. 137, 143.

¹ Secretary may substitute new tenant under a lease. *McNeal v. Market Co.*, 43 Pa. Sup. Ct. 420, 427.

Treasurer may bind by promissory note. Here it purported in the body of the note to be given by him in his official capacity. *Kierstead v. Bennett*, 93 Me. 328, 332, 45 Atl. 42; *Dow v. Moore*, 47 N. H. 419, 424.

So of a note signed by agent, *Kenyon v. Williams*, 19 Ind. 44, 48; *Manning v. Gasharie*, 27 Ind. 399; and a note of managers of a syndicate to buy securities, *Continental National Bank v. Heilman*, 81 Fed. 36, 41; but not on an accommodation endorsement, *Odiorne v. Maxey*, 13 Mass. 178, 181; nor after dissolution, *Lake v. Munford*, 4 Sm. & M. (Miss.) 312, 319.

An officer was held properly removed by vote of the shareholders. *Inderwick v. Snell*, 2 Mac. & G. 216.

has grown up in the case of mining partnerships. The managing agent has implied power to bind the individual members of the firm only on contracts for supplies or labor necessary to the working of the mine. This exception has been explained on the ground that it is a necessary consequence of the fact that the usual rule of *delectus personae* does not apply to mining partnerships. In a case where the superintendent of a mining partnership gave a note for the purchase of ditches for use in the mining without express authority, the court, while finding ratification from the fact that payments were made on it with the knowledge and acquiescence of all the partners, laid down the general rule as above stated and said: "Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits or the established practice of the particular company has established a different rule. The only differences generally existing . . . are such as legitimately flow from the fact that in such partnerships there is no *delectus personae*." ²

² There were numerous changes of the members but the incoming members all knew of the debt. The creditor became a partner and brought a bill for winding up and application of assets to payment of debts. It was held that the firm continued liable though some members had sold their shares and new members who bought with full knowledge took subject to debts. Former partners who once were liable are not necessary parties to this proceeding (p. 194). *Jones v. Clark*, 42 Cal. 180, 191, 193.

Members of a mining partnership are liable for supplies bought on credit essential to the carrying on of the business though as between themselves it was agreed that certain of the partners should not be liable for its debts. Hence attorneys who took shares in payment for legal services were liable. *Manville v. Parks*, 7 Col. 128, 135, 2 Pac. 212.

The power of one partner to bind another is adopted from the law merchant and applies to commercial partnership only. In other partnerships plaintiff must prove express authority or custom or usage of that particular branch of business. The one is a question of law, the

It would seem, however, that this doctrine is probably due to a misunderstanding of the early English cases on mining partnerships, in which it was held that members could bind their co-partners on simple contracts, but not on negotiable instruments, on the theory that such firms were not trading concerns. It is, of course, well settled that members of firms that are not trading or commercial partnerships have no implied power to bind their co-partners by issuing negotiable commercial paper.³

other of fact (p. 75). Hence a member of a mining partnership had no power to bind the other on a contract to purchase lands. *Judge v. Braswell*, 76 Ky. 67.

Members of a mining partnership are liable on labor claims not expressly authorized. *Nolan v. Lovelock*, 1 Mont. 224, 228.

Members of a mining partnership were held personally liable for money borrowed by the manager and used in the necessary prosecution of the business of operating the mine. There was evidence of knowledge and acquiescence of defendants. *Randall v. Meredith*, 11 S. W. 170, 173 (Tex.).

³ Acting directors of a mining company had power to bind a shareholder by contracts made in the usual way of conducting such a concern, in the absence of knowledge of the plaintiff of a restriction to cash dealings. *Hawken v. Bourne*, 8 M. & W. 703, 710.

A shareholder in a mining partnership was held liable for goods supplied on order of directors for ordinary use in the mine. Abinger says that though *Dickinson v. Valpy* held that a mining company is not necessarily formed with the power to pledge the credit of individual members by drawing bills, it is for the jury to say whether directors have power to bind members by dealing on credit (p. 465). Parke says: "No point was made at trial that this was such a partnership as could not deal on credit. If it had, the plaintiff could probably have supplied evidence on that point" (p. 466). *Tredwen v. Bourne*, 6 M. & W. 461.

A member of a mining partnership has not as such implied authority to borrow money on the credit of the association and other members are not liable for such debts. This is so even if he is general manager. *Ricketts v. Bennett*, 4 M. G. & S. 686, 698.

In absence of evidence that it was necessary to the business of a mining company as of a trading company to bind members by drawing bills of exchange, a shareholder is not liable on one in the name of the company drawn by order of directors. *Dickinson v. Valpy*, 10 B. & C. 128, 136.

General agent of mining company has no implied authority to borrow money of a bank to pay workmen who have attached materials even

There have been some decisions suggesting impliedly the applicability of the doctrine of *ultra vires* as applied to corporations,⁴ but in most cases the usual agency rules alone are involved.⁵ The election of an officer must be proved by the records, if available, not by parol.⁶

in such an emergency. Shareholders not liable. *Hawtayne v. Bourne*, 7 M. & W. 595, 599.

When the agent has express authority, it has been held that all partners are bound. A mining partnership voted at a meeting to authorize a contract with the plaintiff to erect a mill which contract was later signed in the firm name by the secretary. There were no written rules but the company usually did business this way. A purchaser of a share previous to this contract who had never attended meetings or taken an active part in the management of the partnership affairs or held himself out to the world as a partner was held liable on this contract. "It may be a matter of regret that our courts have gone to the extent they have in excepting mining partnerships from the general law of partnerships." *Taylor v. Castle*, 42 Cal. 367, 371.

When a member of a mining partnership is bound by the act of his co-partner he is bound to the full extent of the liability (p. 371). So for supplies necessary for the usual working of the mine (p. 372). A mining partnership under the code arises only when the owners work the mine, not when they lease it on shares to an outsider (p. 372). *Stuart v. Adams*, 89 Cal. 367, 26 Pac. 970.

A member of a mining partnership was held liable for wages of an employee hired by the manager regardless of limitations in the articles. (No distinction made between this and a general partnership.) *Burgan v. Lyell*, 2 Mich. 102, 103.

⁴ Grantor of land to a joint stock association in excess of its statutory power to hold cannot proceed to set it aside. That is a province of the State. *Howell v. Earp*, 21 Hun 393, 395.

Managing a hotel was held within the powers of a seaside land company because the land on which it stood was included in the description in the original deed to the trustees of the association. *Quimby v. Tapley*, 202 Mass. 601, 89 N. E. 167.

⁵ Shareholders in an informal association to run stage lines were sued in a winding up proceeding. Held: All stockholders are liable to creditors without notice for acts of directors even outside the objects of the association. All liable to contribution for acts within scope of association. Shareholders who had knowledge of acts of directors and ratified them by silent acquiescence are liable even to creditors who had notice. *Rianhard v. Hovey*, 13 Ohio 300, 302.

⁶ *Saltsman v. Shults*, 14 Hun 256.

The acts of an unincorporated association may be proved by parol, though they kept a record. *Willis v. Chapman*, 68 Vt. 459, 467, 35 Atl. 459; *Newell v. Borden*, 128 Mass. 31.

The assessment book of a mining association which was accessible to members and of the contents of which a member had knowledge and

It has been held that individual members of such an association have not implied power to bind it by their acts, like ordinary partners.⁷ The courts will enforce reasonable regulations of associations for profit⁸ but

the correctness of which had never been disputed was admissible against him as to the extent of his ownership. *Abernathie v. Virginia Co.*, 16 Nev. 260, 268.

⁷ *Spotswood v. Morris*, 12 Idaho 360, 384, 85 Pac. 1094, 1102; *Oliver's Estate*, 136 Pa. St. 43, 59, 20 Atl. 527; *Willis v. Greiner*, 26 S. W. 858 (Tex. Civ. App.).

In the case of mining partnerships it has been held that a member has no implied power to bind the other members on any contract. The reason assigned is that the rule of *delectus personae* does not apply to association with transferable shares and therefore the mutual confidence which should accompany the power to impose unlimited liability on fellow members is lacking. *Skillman v. Lachman*, 23 Cal. 198, 206.

The owners of the mine as tenants in common in the working of it were partners. "As mining partnerships are not usually founded on the *delectus personae*, the powers of the individual members of the firm are much more limited than are the powers of the individual members of a purely commercial or trading partnership." Those holding the majority interest control its policy, but their conduct will be most jealously scrutinized. *Dougherty v. Creary*, 30 Cal. 290, 300.

Members of an irrigation association who own a ditch and convey water and sell it to miners for mining purposes are not like an ordinary commercial partnership. A member has no implied authority to bind the members by his contracts. A managing agent has no authority but that conferred on him either expressly or by necessary implication from his acts recognized by the company with full knowledge of the acts at the time of recognition (p. 370). This was on a note given for lumber to repair the ditch. The members so far as informed were told that the lumber was to be paid for out of proceeds of sale of water (p. 371). *McConnell v. Denver*, 35 Cal. 365.

When members of a mining partnership disagree the majority in interest control but are said to be liable to the minority for "culpable negligence or breach of duty." *Bartlett v. Boyles*, 66 W. Va. 327, 330, 66 S. E. 474.

There is a curious old case of an association to run a steamboat which the court said was not a partnership, in which it was also said: "The general principle of law is that in such private associations the majority cannot bind the minority unless it be by special agreement." A stipulation for majority vote was held to apply only to the details of management and not to fundamentals. *Livingston v. Lynch*, 4 Johns. Ch. 573.

⁸ Where by-laws provided that tellers be appointed by stockholders and they were appointed by the chairman against the protest of the shareholders an election so held was void. *Tidewater Pipe Co. v. Satterfield*, 12 Weekly Note Cas. 457.

it has been held that the members are not bound by unreasonable ones.⁹ The majority have no power to violate the articles of agreement without unanimous consent.¹⁰ A member of an association buying up notes of the association in fact pays his own obligation. Equity, however, will keep them alive for purposes of accounting and contribution, but will not let him

⁹ Action by a shareholder in a partnership association for labor performed for it. Its by-laws provided that all members should be bound by its rules and regulations from time to time adopted. It passed a resolution that its funds should be applied to developing the business instead of paying the employees. Held: This does not prevent plaintiff from suing for his labor though it is conceded that stockholders would be bound by regulations from time to time adopted if they are reasonable. *McCarthy v. Caledonia Coal Co.*, 164 Mich. 692, 130 N. W. 207.

But where a clause in the deed of trust of an English unincorporated joint stock company provided that a special meeting could remove an officer "for negligence, misconduct or any other reasonable cause," it was held not to mean such a cause as a court would find *bona fide* and founded on sufficient evidence, but such cause as the shareholders duly assembled deem reasonable. *Inderwick v. Snell*, 2 Mac. & G. 216.

¹⁰ Brewing company. Held: One person could not be appointed at a general quarterly meeting in place of the two originally appointed under the deed unless with the consent of all subscribers. *Davies v. Hawkins*, 3 Maule & Selwyn 488.

A company was formed to build a corn exchange. Deed of settlement limited the amount of each shareholder's subscription and restricted the authority of the directors to borrow. The directors borrowed and incurred debts. Held: Could not charge shareholders for either beyond the amount of their subscriptions. *Worcester Corn Exchange Company's Case*, 3 De G. M. & G. 180.

A partnership association was formed to deal in lands in Wisconsin. There was a bill by a shareholder alleging fraud of the officers and members in getting title in severalty to part of the land through taking up mortgages. Held: Plaintiff cannot contend that the mortgages and assignments were invalid because authorized at meetings held outside the State because he voted by proxy at them. The managers had authority to mortgage. Their meetings are presumed to be regular. *Stradley v. Cargill Co.*, 135 Mich. 367, 375, 97 N. W. 775.

The rights of mining partners so nearly partake of the rights of cotenants that the majority interest in case of disagreement have no right to sell and convey the interest of the minority in a mining lease (p. 269). All the partners are liable on a contract made by the majority not in negligence or bad faith (p. 270). *Edinger v. Southern Oil Co.*, 69 W. Va. 34, 71 S. E. 266.

make a profit out of them;¹¹ nor can a member make a secret profit out of a competing business.¹² It has been held that an officer, because he is a partner, is not entitled to pay for his services in the absence of agreement.¹³

§ 23. Pleading of Informal Associations for Profit

In litigation by or against the association all members should be joined as parties¹ unless the non-joinder is

¹¹ *Coleman v. Coleman*, 78 Ind. 344, 346.

Members cannot make a secret profit at the expense of the association. *McDowell v. Joice*, 149 Ill. 124, 36 N. E. 1012.

Promoters owe a fiduciary obligation to each other (*dictum*). *Cortes Co. v. Tannhauser*, 45 Fed. 730.

A promoter was held liable to members of his syndicate for a secret profit both on grounds of agency and as a partner. *Baltimore Trust Co. v. Hambleton*, 84 Md. 456, 36 Atl. 597.

One of a group engaged in a real estate deal was held liable for a secret profit. The court said it was not necessary to decide whether it was a partnership or not because there is the same fiduciary obligation between parties engaged in a common enterprise whether partners or not. *Bestor v. Barker*, 106 Ala. 240, 17 So. 389.

Plaintiff sued as subscriber to an agreement to buy land. In fact the land belonged to the defendants who also subscribed but did not disclose their interest. Held: Circulating such a paper was a false representation. Defendants also liable for secret profit as partners. *Getty v. Devlin*, 54 N. Y. 403, 412.

¹² An association was formed to send a party of members to California for gold. The association provided the outfit for eight members, who were to have one-half the profits of their work, the rest to go to the association. On reaching California they broke up and worked separately and defendant struck gold. Held: He is bound to share this with the other members of the association. Though a partnership may be dissolved by act of a member this should be communicated to the others. It does not appear that the eight did more than decide to work separately. They were in the position of employees and bound by their contract. *Eagle v. Bucher*, 6 Ohio St. 295, 301.

But this does not apply after the original enterprise has been properly abandoned. Mining venture. *Waring v. Cram*, 1 Pars. Sel. Eq. Cas. 516.

¹³ Since a joint stock association is only a partnership a shareholder who serves as secretary and treasurer without stipulating as to his pay cannot recover for the services. *Re Fry*, 4 Phila. 129, 133.

¹ *Metal Stamping Co. v. Crandall*, Fed. Cas. No. 9493 C (bill of revivor by an association which had acquired title to certain patents

not pleaded in abatement.² This rule, however, is of course modified by the general rule of equity as to suits in which the parties on one side or the other are very numerous, viz., that it is sufficient if enough are joined to represent fairly all others of like interest.³ When members of the association are sued, the plaintiff must prove the joint liability of all defendants or dismiss as to those not liable.⁴ The association cannot be made a party in its association name⁵ unless there is express

after death of inventor in whose name suit was originally brought. Should have proceeded by supplemental bill in names of all partners); *Williams v. Michigan Bank*, 7 Wend. 539; *Montgomery v. Knox*, 20 Fla. 372, 380 (bill for receiver by members of mutual fire insurance association).

² *McCreary v. Chandler*, 58 Me. 537.

If the defendant pleads non-joinder, he must give the names of the other partners. *Kingsland v. Braisted*, 2 Lans. 17, 20 (N. Y.).

³ A few of the shareholders of an unincorporated association may sue on a claim of the association without joining all. To complete execution of a lease, *Taylor v. Salmon*, 4 M. & C. 134; to recover subscriptions, *Walworth v. Holt*, 4 M. & C. 619; to rescind a contract, *Small v. Atwood*, 1 Younge 407; to recover misappropriated funds, *Chancey v. May*, Finch Ch. Cas. 592.

Cockburn v. Thompson, 16 Ves. 321; *Von Schmidt v. Huntington*, 1 Cal. 55; *Martin v. Dryden*, 6 Ill. 187, 209 (bill to establish a trust in land bought for a land syndicate); *Mann v. Butler*, 2 Barb. Ch. 362, 368 (bill for winding up a land trust).

A bill in equity by a secretary of an unincorporated association on behalf of himself and all other members was dismissed on the merits. Another bill against the same defendants was filed in the name of the association on the same facts. Held: *Res judicata* because of former suit. The secretary was authorized to sue. *American, etc. Ass'n v. Importers' Ass'n*, 114 Ill. App. 136, 140.

A bill to wind up a mining partnership alleged that members were numerous and some could not be ascertained. A few were allowed to represent all and the mine was sold by a receiver. On a bill later to quiet title held that the former decree could not affect the title of absent members of the mining partnership for they held that title as tenants in common. *Santa Clara Mining Ass'n v. Quicksilver Mining Co.*, 17 Fed. 657, 659 (C. C. — Cal.).

⁴ *Powell Co. v. Finn*, 198 Ill. 567, 569, 64 N. E. 1036 (improvement association).

⁵ *Mutual v. Reser*, 43 Ind. App. 634, 638, 88 N. E. 349.

Even where it has appeared and answered in the name in which it was sued. Action for personal injuries against bondholders who were

statutory authority for such procedure.⁶ An agreement to allow an agent of the association to sue in his own name on contracts made with the association will not be enforced.⁷ A statute providing for service of process

reorganizing and operating through an agent. *Light Co. v. Muncey*, 33 Tex. Civ. App. 416, 419, 76 S. W. 931.

In some cases it has been held proper practice to name the association as a party with certain individual members. Here there was no plea in abatement, however. *McNeal v. Market Co.*, 43 Pa. Sup. Ct. 420, 427. So by statute. *Inglis v. Millersburg Driving Ass'n*, 136 N. W. 443, 445 (Mich.).

⁶ *Hewitt v. Storey*, 39 Fed. 719, 721 (C. C. — Cal.) (ditch company); but the name actually used must be correctly stated, *King v. Randlett*, 33 Cal. 318, 322.

Camden, etc. R. Co. v. Pennsylvania Guarantors, 59 N. J. L. 328, 35 Atl. 796; *Weaver v. Trustees, etc. Canal*, 28 Ind. 112 (action in name of trustees authorized by statute).

It has been held that action may be brought in the name of the trustee in accordance with the articles of association in the absence of statute. *Laughlin v. Greene*, 14 Ia. 92, 94; and likewise against the trustees as defendants, *Mutual v. Reser*, 43 Ind. App. 634, 638, 88 N. E. 349.

It is constitutional for the legislature to authorize unincorporated associations to sue and be sued by their association name. It affects remedies and not fundamental rights. *Warner v. Beers*, 23 Wend. 102, 151, 152.

Action by the Akron Brick Association against one who had agreed to pay for brick it was furnishing to sub-contractors for defendant. Defendant set up that plaintiff was an illegal association to suppress competition and enhance prices. Held: By statute a partnership may sue in its firm name. A partnership can be formed only for a lawful purpose. Hence the association not being lawful does not come within the terms of the statute and cannot sue in its own name. This does not deny the right of the members of the association to enforce contracts in their own names which do not depend on the illegal arrangement. *Jackson v. Akron Brick Ass'n*, 53 Ohio St. 303, 41 N. E. 257, 57 Am. St. Rep. 637, 35 L. R. A. 287.

An individual doing business under a company name could not sue in that name under a statute giving that right to associations (*semble*). *Meyer v. Furniture, etc. Co.*, 76 Neb. 405, 408, 107 N. W. 767.

A special statute authorizing the president of an insolvent unincorporated bank to sue in his own name the debtors to the bank is constitutional. It is a way of allowing a partnership to sue. *Lewis v. McElwain*, 16 Ohio St. 347.

⁷ The rules of a mutual unincorporated insurance association provided that the manager might sue in his own name for the contributions due from the members. This was such an action. Held: An agreement to authorize an agent to sue on behalf of an unincorporated

on an agent of unincorporated associations is constitutional.⁸ By contracting with an association in its company name a party is not estopped to deny it is a corporation.⁹ The members can sue for libel as individuals having a common interest in the business affected.¹⁰ Adjustment of accounts between a ship master and an association of which he was agent was held not within the jurisdiction of admiralty,¹¹ but in one case a court of admiralty enforced a trust in favor of such an association against an individual creditor of the trustee.¹² Courts of equity have jurisdiction to appoint a receiver of an association as prayed for in a bill containing allegations of waste.¹³

company or partnership is one that the law does not recognize. The defendant's promise was not an agreement with the manager, but with him as agent of the association. Hence demurrer sustained. *Evans v. Hooper*, L. R. 1 Q. B. D. 45, 48.

⁸ Appeal of Baylor, 93 S. C. 414, 77 S. E. 59.

In Massachusetts by statute foreign express companies are obliged to designate an agent for service of process. R. L. Ch. 70, § 3. It is an interesting problem how execution could be levied on a shareholder in an action so brought where the company is, as is usual, sued in the association name.

An action against an unincorporated association selling religious books was held properly brought by service on the agent in charge of its affairs in the absence of statutory authority. *Slaughter v. American Baptist Missionary Society*, 150 S. W. 224, 227.

⁹ *Re Mendenhall*, Fed. Cas. No. 9425; *Williams v. Michigan Bank*, 7 Wend. 539.

¹⁰ *Bar Co. v. Zimmerman*, 110 Md. 313, 321, 73 Atl. 19 (attempted incorporation).

¹¹ *Grant v. Pollion*, 20 How. 162.

¹² Members of a joint stock company for mining and trading in California bought a vessel and stores and took title in names of representatives whose creditors have attached it. Libel in admiralty by the members of the association for title and possession to the vessel and stores. Decree for libellants. Attaching creditor had notice of the trust when debt contracted. No allowance for services of the trustee because of misconduct. *The Taranto*, Fed. Cas. 13751 (D. C. — Mass.).

¹³ Facts held not to justify allegation of plaintiff in an application for a temporary receiver of a joint stock association on a stockholder's bill alleging waste. *Dudley v. Platt*, 127 N. Y. S. 154, 70 Misc. 322.

§ 24. Rights and Liabilities of Shareholders

The most important practical question in the law of partnership is the individual liability of partners for the debts of the concern. In accordance with the rule applied to ordinary partnerships, when none of the methods discussed hereafter ¹ by which shareholders in associations have endeavored to avoid this liability are adopted, it is held that the shareholder or member is personally liable for the debts of the association ² and

¹ See §§ 29-31 inclusive.

² *Greenup v. Barbee's Exec.*, 1 Bibb. 320 (Ky.) (*dictum*); *Jenne v. Matlack*, 19 Ky. Law Rep. 503, 41 S. W. 11 (industrial exposition); *Holt v. Blake*, 47 Me. 62 (newspaper); *Frost v. Walker*, 60 Me. 468, 470 (express company); *Bain v. Loan Ass'n*, 112 N. C. 248, 17 S. E. 154 (loan association); *Parrott v. Eyre*, 10 Bing. 283 (trustees of turnpike borrowed money not in accordance with the statute and so were not relieved of personal liability); *Keasley v. Codd*, 2 C. & P. 408 (member of London Carrier Co. liable for goods sold and delivered); *Mandsley v. LeBlane*, 2 C. & P. 409 (director of Steam Washing Co. liable on contract made at a meeting he did not attend); *Bennett v. Lathrop*, 71 Conn. 613, 616, 42 Atl. 634 (member of athletic club formed to run a polo team for pleasure and profit was liable); *Wadsworth v. Duncan*, 164 Ill. 360, 45 N. E. 132 (shareholder in bank liable to depositor); *Manning v. Gasharie*, 27 Ind. 399 (member of coöperative store liable on note signed by its agent); *Lynch v. Postlethwaite*, 7 Mart. (La.) 69, 208, 213 (stockholder in steamboat company liable on contract to build boat); *English v. Wall*, 12 Rob. (La.) 132, 135 (member of banking association liable on bills of exchange and certificates of deposit); *Dow v. Moore*, 47 N. H. 419, 424 (members of coöperative store liable on treasurer's notes); *Camden R. Co. v. Pennsylvania Guarantors*, 59 N. J. L. 328, 35 Atl. 796 (Members of insurance association liable on policy); *Wells v. Gates*, 18 Barb. (N. Y.) 554, 556 (member of association formed to publish scientific journal was liable); *Nolan v. McNamee*, 82 Wash. 585, 144 Pac. 904.

Plaintiff contracted to furnish news to the Baltimore Newspaper Association. By the terms of the contract the members were not only entitled to use the news themselves but might sell it to outsiders. Held: Members liable as partners. *United Press v. Abell Co.*, 84 N. Y. S. 425, 87 App. Div. 630.

Declaration in contract against members of an association is not denurrable if it alleges they are organized for pecuniary profit. *Ranken v. Probey*, 115 N. Y. S. 832, 131 App. Div. 328.

Members of a bridge building association formed in contemplation of incorporation and which later is incorporated are personally liable

for damages caused by its negligence.³ A member is liable for torts of the association⁴ or of another member while engaged in the business of the association.⁵

as partners for debts incurred before incorporation. *Broyles v. McCoy*, 37 Tenn. 602.

The liability of members of a joint stock association organized in Canada is to be determined by the law of Canada. At common law it is settled that they are liable *in solido* for the debts of the association. *Cutler v. Thomas*, 25 Vt. 73, 77.

³ *Inglis v. Millersburg Driving Ass'n*, 169 Mich. 311, 136 N. W. 443 (negligently burning brush so that it fired adjoining property. Race track association).

⁴ *Farmers Co. v. Jones*, 147 S. W. 668 (Tex. Civ. App.) (personal injuries).

A syndicate promoted a corporation and was sued by the corporation for secret profits made by the managers of the syndicate. Held: All the partners are liable for the acts of misfeasance of the managing partners. Not a personal action that dies with the partner. His estate can be held in equity. *New Sombrero Co. v. Erlanger*, L. R. 5 Ch. D. 73, 117.

A sale by a trustee of the trust estate to an association of which he is a member is voidable. "All his associates are chargeable with the same considerations which would bear upon him were he solely interested as purchaser." *Robbins v. Butler*, 24 Ill. 387, 432.

⁵ Licensed pilots formed an association. Pilots took turns in boarding vessels, fees were paid into a common fund. Association hired offices and boats and paid expenses out of funds including operation of pilot boats. Plaintiff sued members of association for negligence of one of the pilots. Held: Members were partners and so liable (p. 230). The relation between plaintiff and pilot was not contractual but compulsory. "Whether the respondents are liable as partners or not, there would seem to be no reason why they should not be held jointly liable for the faithful performance of their duties discharged under the circumstances set forth in the libel, where it appears that although not incorporated and therefore not liable as an association, they in effect act by joint coöperation in the discharge of their duties" (p. 233). *Donald v. Guy*, 127 Fed. 228 (D. C. — Va.).

Suit in admiralty by members of a Tug Line in contract against owners of a schooner for salvage services. She was being towed by a tug of the association and by its negligence stranded and others of the association went to its assistance. This was an association like the pilot association by owners of tugs. Profits distributed *pro rata* agreed valuation of tugs. Held: Partners. The mutual agency has been delegated to a general manager. Liable for losses. Duty of association to do what these tugs did to relieve schooner stranded by negligence of a member (p. 955). Hence no implied contract to pay for it. Independently of partnership the service was not rendered with the idea of compensation because of joint relation of boats (p. 956). *Fleming v. Lay*, 109 Fed. 952 (C. C. A. — Ohio).

Though a national bank may acquire title to shares in a corporation which have been previously pledged to it as security for a debt, it is beyond its power to take title under similar circumstances to shares in an association for profit because of the liability incurred by members of a partnership. A partnership was formed to purchase, improve, divide into lots and sell a leasehold. There were forty shares in the firm, represented by transferable certificates. A national bank took nine of these as security for a debt and afterwards became owner of them in satisfaction of the debt, subject to the question whether the transfer was within the powers of a national bank. In a bill for dissolution of the partnership it appeared that contribution was necessary to the debts of the firm and that some partners were insolvent. The Supreme Court of Ohio held (69 Oh. St. 160) that the bank was not a partner and therefore not liable for the full amount of the debts of the firm, but that it became a part owner of the property and, as it joined in the management of the same, was liable for nine-fortieths of the expenses which constituted the debts of the firm. In the opinion of the Supreme Court of the United States, Holmes, J., said: "As the Supreme Court of Ohio assumes such partnerships and certificates to be valid, we assume them to be (citing cases). We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But from the point of view of the law, there is a very important

difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore, when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good-will of the concern after the debts are paid. If this right is worth something it is a proper security, and if it is worth nothing no harm is done. It is true that a statute may add a liability, but when, as usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds.

“But to take a share by transfer on the books means to become a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation and his rights with regard to the corporate property are incident to his position as such. (Citing cases.) This does not matter or matters less, in the case of a corporation for the reasons which we have stated. But when a similar transfer is made of a share in a partnership it means that the transferer at once becomes a member of the firm and goes into the business with an unlimited personal liability, in short, does precisely what a national bank has no authority to do. This the Supreme Court of Ohio rightly held beyond the powers of the bank. (Citing cases.) It is true that it has been held that a pledgee may escape liability if it appears on the certificate and books that he is only a pledgee. (Citing cases.) No doubt the security might be realized without the pledgee ever becoming a member of

the firm. It is not necessary in this case to say that shares like the present could not be accepted as security in any form by a national bank. But such a bank cannot accept an absolute transfer of them to itself. It recently has been decided that a national bank cannot take stock in a new speculative corporation with the common double liability in satisfaction of debt. *First National Bank of Ottawa v. Converse*, 200 U. S. 425. *A fortiori*, it cannot take shares in a partnership to the same end.

"We are of opinion that with the liability as partners all liability falls. The transfer of the shares to the bank was not a direct transfer of a legal interest in the leasehold, which was in the hands of trustees. It was simply a transfer of a right to have the property accounted for and to receive a share of any balance left after paying debts and the acquisition of this right was incident solely to membership in the firm. If this membership failed the incidental rights failed with it, and with the rights the liabilities also disappeared. Becoming a member of the firm was a condition of both consequences. As the bank was not estopped to deny that it was a partner, it was not estopped to deny all liability for partnership debts."⁶

A judgment against one member merges the cause of action against all other members and they cannot thereafter be sued.⁷ One member cannot sue another member on a firm transaction at law,⁸ unless there has been

⁶ *Merchants National Bank v. Wehrmann*, 202 U. S. 295, 300, 50 L. ed. 1036, 26 S. Ct. 613 (three judges dissented).

⁷ *United Press v. Abell Co.*, 84 N. Y. S. 425, 87 App. Div. 630.

⁸ A member of a joint stock company cannot sue in assumpsit at law another member who has taken possession of the property of the association for its use. *Whitehouse v. Sprague*, 7 Atl. 17 (Me.).

Action at law on a subscription agreement to form a joint stock

an accounting fixing the amount due⁹ or the transaction has otherwise been severed from the mutual obli-

company and buy a ship. Held: The plaintiffs as members could not sue the defendants as members at law. The only remedy is in equity for an account as between partners. *Myrick v. Dame*, 9 Cush. 248, 254.

A fruit canning association is described as a partnership, but liability of members is put upon agency by direct authority. Action at law between members impossible. Hence member who took over debts and sued another member at law could not recover. *Laney v. Fickel*, 83 Mo. App. 60, 63.

Joint stock association to operate a water power. Held: Partners. A note to a shareholder endorsed by him to one not a shareholder can be sued on at law (p. 676). A shareholder who has sold out is still liable if the plaintiff at the time the debt was contracted did not know of his retirement but acted in reliance on his membership (p. 678). "A partnership or joint stock company is just as distinct and palpable an entity in the idea of the law as distinguished from the individuals composing it as is a corporation; and can contract as an individualized and unified party with an individual person who is a member thereof as effectually as a corporation can contract with one of the stockholders." The only difference is a technical one of procedure (p. 676). *Walker v. Wait*, 50 Vt. 668.

Conway v. Zendler, 154 Wis. 479, 143 N. W. 162. An assignee of a member cannot sue. *Bullard v. Kinney*, 10 Cal. 60, 63 (claim for goods sold).

A stockholder in an express company sued for loss of a package. Under New York statute he sued president. Held: Statute permits a member to sue. Since statute limits remedy to funds of the association it eliminates the objection of partnership that plaintiff would be suing himself. The president for purpose of action is made a corporation sole. It is plain that joint stock associations organized under the statute have some of the powers and privileges of corporations not possessed by individuals or partnerships. *Westcott v. Fargo*, 61 N. Y. 542, 550, 19 Am. Rep. 300; Acc. *Sander v. Edling*, 13 Daly (N. Y.) 238; *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69; *Saltsman v. Schultz*, 14 Hun 256.

Action against members of an association (not a joint stock company) after judgment against the association under the statute. Held: Defendant may plead non-joinder of other partners but must give their names. The fact that the plaintiff is a firm some of whose members are also members of the defendant association is no bar to an action at law since the distinction between actions at law and suits in equity is abolished. *Kingsland v. Braisted*, 2 Lans. 17, 20 (N. Y.).

One member of a mining partnership cannot sue another at law until there has been an accounting. On the death of the plaintiff's testator the firm was not dissolved and his estate succeeded to his interest. *Boehme v. Fitzgerald*, 43 Mont. 226, 115 Pac. 413.

Semble: One who lends money to an association and later becomes a member may bring an action at law on it though a partner. *Garrand v. Hardey*, 5 M. & G. 251, 477, 484.

⁹ Refund of contributions to an association formed to hire sub-

gations of the members.¹⁰ Within this rule he is liable at law for his agreed contribution to the capital.¹¹ Whether or not a subscriber is liable before the entire capital is subscribed, depends on the interpretation of the articles of agreement.¹² If a corporation is organ-

stitutes for an army draft. *Koehler v. Brown*, 2 Daly (N. Y.) 78.

It is not clear whether the following case belongs in this note or as a *contra* case under the preceding note. The point was not discussed in the opinion. *Boyd v. Merriell*, 52 Ill. 151, 153.

Deceased subscribed with others an agreement to organize a joint stock company. After his death the survivors conveyed to the plaintiff all the assets of the company including the accounts due. Held: This was a partnership and dissolved by death. There are no creditors. The transfer of accounts receivable could not be assigned so as to enable the assignee to sue without an accounting. *Villas v. Farwell*, 9 Wis. 460, 462.

¹⁰ Written contract to pay debts for keep of a horse sold defendant by association. *Simpson v. Ritchie*, 110 Me. 299, 86 Atl. 124.

¹¹ Member of stage line company liable to its agent on his subscription. *Bryant v. Goodnow*, 5 Pick. 228.

Contra. An unincorporated mining company cannot sue in the name of its trustee a member for a balance of his subscription, but must proceed in equity for a partnership account. *Niven v. Spiekerman*, 12 Johns. 401.

An agreement to organize a joint stock company in substance binding the signers to pay the sum set after their names is in effect a promise to the other signers to make the payment and is binding. False representations by one of the signers to the defendant are not binding on the others and do not avoid his subscription. *Kimmins v. Wilson*, 8 W. Va. 584, 590.

Subscriptions to shares in a joint stock company were expressly made to trustees for the association. Held: They were partners. Ordinarily the contract of subscriptions is made with all the members and the action would have to be by all of them, but where expressly payable to trustee they are the ones to sue. *Cross v. Jackson*, 5 Hill 478, 480.

¹² A scheme for sale of shares in a real estate speculation seems to have contemplated an association because the certificate provided for majority control of sales. In an action on a subscription, Held: The subscriber was liable whether or not all the shares were subscribed (no discussion of associations). *Sandford v. Halsey*, 2 Den. 235, 250. See *Sickelsteel v. Edmonds*, 158 Wis. 122, 136, 147 N. W. 1024.

A landowner projected a joint stock association to own and sell the land. Held: On interpretation of the articles of agreement no subscriber was to be liable till the entire capital had been subscribed. *Sanford v. Handy*, 25 Wend. 475, 479.

ized instead of an association, one who subscribed to an association is generally held not liable to the corporation on his subscription.¹³ When shares are forfeited by the association for non-payment of subscriptions in accordance with the articles of agreement, the subscriber is usually allowed by the courts to redeem, if no rights of others have intervened.¹⁴ If the articles impose no penalty for failure to pay assessments, there is no authority for a forfeiture of shares.¹⁵ A member may, of course, bring a bill in equity for contribution to its debts,¹⁶ but not on a debt incurred in violation of

¹³ *Knottessville Co. v. Mattingly*, 18 Ky. Law Rep. 246, 35 S. W. 1114; *Machias Co. v. Coyle*, 35 Me. 405.

Because it is not assignable to the corporation and he does not become a member of the corporation without his assent. *Wallingford Co. v. Fox*, 12 Vt. 304, 309.

A joint stock company was formed by subscriptions payable to trustees. Incorporation was contemplated and subsequently carried out. The corporation as successor to trustees sued on these subscription promises. Held: Though the subscribers were partners and the trustee was a co-partner an action at law can be brought on a partner's promise to contribute to the original capital of the firm. (Only one decision by Chancellor Kent, *Livingston v. Lynch*, held *contra*.) *Townsend v. Goewey*, 19 Wend. 424, 427, 429.

¹⁴ Articles of agreement of an unincorporated association provided that on failure to pay assessments shares should be forfeited, but no method of forfeiture specified. Held: No rights having intervened, after such a forfeiture the shareholder will be allowed in equity to redeem. Suggested that bill to foreclose was the only effective method under these articles. *Walker v. Ogden*, Fed. Cas. 17081 (C. C.—Ill.).

A shareholder in a voluntary association under a deed of trust to work a mine failed to pay assessments and his shares were forfeited under the provision in the deed of trust. Held: "Equity will not relieve against a forfeiture of stock where the shareholder has acquiesced in the same until a change of circumstances or conditions has arisen." Also held partnership. *Joseph v. Davenport*, 116 Ia. 268, 274, 89 N. W. 1081.

¹⁵ *Stringham v. Durkee*, 8 Wis. 1, 130.

¹⁶ *Henry v. Jackson*, 37 Vt. 431 (coöperative store); see § 28, note 8, and § 31, note 11.

Bill by one shareholder in an association for an account and payment of subscriptions by those who had subscribed for shares. Held: Merely subscribing for shares does not constitute the subscriber a member of the association or partner. It is merely a declaration of in-

the articles of association.¹⁷ If the company refuses to recognize a shareholder he is entitled to a decree affirming his interest and for an account.¹⁸ The certificate for shares in an association like the certificate for shares in a corporation is simply a muniment of title as evidence of the ownership of the share and the issue of the certificate is not essential in order to constitute membership in the association.¹⁹ There are some early cases which refused equitable relief to members of associations for profit on the ground that members should first seek relief within the organization.²⁰

tention by the subscriber to become a partner. The meeting of some of the subscribers to organize binds none but those who meet. Hence bill dismissed without prejudice to an action at law of the company on the subscription. *Appeal of Hedge*, 63 Pa. St. 273, 277. See also *Galveston City Co. v. Scott*, 42 Tex. 535, 553.

On winding up a banking partnership with transferable shares it appeared that some former shareholders had paid judgments recovered against them. They sought to prove these claims against the estate, but claims were disallowed. All creditors of the partnership at date of dissolution had been paid. *Stockdale v. Maginn*, 207 Pa. St. 227, 56 Atl. 439. See *Sickelsteel v. Edmonds*, 158 Wis. 122, 136, 147 N. W. 1024.

¹⁷ Oil land association. Articles forbade increase of capital without consent of majority of shareholders. Debt incurred in borrowing money to buy additional land. *Crimm's Appeal*, 66 Pa. St. 474, 477.

¹⁸ A shareholder in a joint stock company, formed to construct a ditch to supply water to mines, whom the company refuses to recognize as a stockholder, on a bill in equity is entitled to a decree affirming his interest and directing an account. *Smith v. Fagan*, 17 Cal. 178, 181. See also *Lesseps v. Architect Co.*, 13 La. 414.

Bill by shareholder of an unincorporated association for accounting must be brought for benefit of himself and all other shareholders. *Warth v. Radde*, 18 Abb. Pr. 396.

¹⁹ *Yeaman v. Galveston City Co.*, 167 S. W. 710, 720 (Tex.).

²⁰ Bill for receiver and winding up of brewery association. The agreement provided for monthly meetings and for a committee to oversee the managers and call meetings if managers misbehave. Held: Will not take jurisdiction till plaintiff has exhausted remedies within the organization (apparently appeal to the committee or to a meeting) (p. 158). But intimates that in an emergency court might act when delinquency clearly made out (p. 159). *Carlen v. Drury*, 1 Ves. & B. 154.

A mutual fire insurance company was organized under a deed providing for certain officers, auditors, etc. It in fact neglected to carry

This is apparently on the analogy of the rule regarding non-profit associations which will be discussed later.²¹

§ 25. Termination of Liability

In the absence of agreement, a partner cannot divest himself of his connection with the firm without the consent of his co-partners¹ nor make an assignee of his interest a member of the firm without such consent.²

out these provisions and left the management entirely to its founder. Certain members on behalf of the whole now bring a bill to enjoin him from receiving more premiums charging misconduct. Held: Association valid as long as membership not transferable, but court cannot interfere where the members have failed to carry out the provisions of the deed of trust. It must be treated as a general partnership. If they will not act on their deed the court cannot manage their affairs for them. (Hard to understand unless it means that they must first seek relief within the society.) *Ellison v. Bignold*, 2 Jacob & Walker 503, 512.

Theatre Association. Shareholders right to seats. The court will not interfere to enforce duties which are properly subject of internal regulation (p. 423). Power to manage business conferred on board of directors includes power to remit rent (p. 419). Treated as partners throughout. *Fareira's Appeal*, 3 Walk. 416 (Pa.).

An association was formed by subscriptions to build a high school. It is not clear whether it was a corporation or not. The building was built and shares were issued. The holder of nearly all the shares repaired the building and was about to move it off. Held: Remaining shareholders may have a temporary injunction. Action by association not a requisite preliminary because defendant controls stock. Association should be made party. *Marston v. Durgin*, 54 N. H. 347, 374.

²¹ See § 58.

¹ *Strang v. Osborne*, 42 Cal. 187, 94 Pac. 320 (mining irrigation ditch association. The opinion sometimes talks as though the members were merely tenants in common); *Stimson v. Lewis*, 36 Vt. 91, 95, 98 (co-operative store). *Contra*, *Norwood v. Francis*, 25 App. D. C. 463, 471.

A charge that if a member of a banking association notified the bank to transfer his stock to another and the bank declined to do it and he thereafter acted as director and voted by proxy at stockholders' meeting he was still liable to creditors as a partner was correct. So if he was held out as a director to his knowledge. *Bradford v. National Benefit Ass'n*, 26 App. D. C. 268, 273.

² *Stimson v. Lewis*, 36 Vt. 91, 95, 98.

An association was formed to prosecute a voyage to California and carry on business there. Constitution prohibited any member from

But in associations for profit the consent is given in advance and provision for transferable shares is almost always made.³ Assignees of shares are not subject to claims the association may have against their assignors.⁴

A general assignment by a shareholder is a withdrawal where shares are transferable.⁵ But where the articles of association provide a special method for transfer of shares, that method must be followed.⁶ Transfer of shares that have been recognized by the association are valid though not carried out according

withdrawing without the consent of the majority and declared penalty of forfeiture of his share for such withdrawal. Shares also made transferable by endorsement on the certificate. In an action by a shareholder against the president for a share in the profits, Held: Since the constitution provided for a president and directors who should have exclusive direction of all concerns of the company, "it became rather a joint stock company than a proper co-partnership. If they had been co-partners, each individual could have disposed of the whole property, incurred liabilities and made purchases." Though he allowed an outsider to represent his share for a time, plaintiff had no power to introduce him as a member. Hence the acts of this party could not forfeit plaintiff's share. *Cox v. Bodfish*, 35 Me. 302, 306.

³ The peculiar characteristic of joint stock companies, as distinguished from partnerships, is the right of the holder of any interest in it, whether great or small, to transfer it to a stranger without the consent of his co-owners. *Cincinnati Co. v. Citizens' Bank*, 11 Ohio Dec. 50.

⁴ Shareholder in an association cannot object to the right of another shareholder to receive a dividend on the ground that the transfer to him was without authority and that the shares were subject to a claim of the association against a former holder when the present holder took for value and without notice and the trustees for the shareholders made the transfer on their books without objection. *Cohen v. Gwynn*, 4 Md. Ch. 357, 362.

Holders of shares in a joint stock land company are not subject to any set-off which the association has against the assignors (p. 320). Agent unlike a partner is entitled to claim compensation for services (p. 327). Possibly it was incorporated (p. 321). *Spence v. Whitaker*, 3 Port 297 (Ala.).

⁵ *Swoope v. Wakefield*, 10 Pa. Super. Ct. 342, 351 (coöperative store).

⁶ *Robbins v. Butler*, 24 Ill. 387, 426. At least as between the members. *Wadsworth v. Duncan*, 164 Ill. 360, 362, 45 N. E. 132; *Harper v. Raymond*, 3 Bosw. 29, 39 (N. Y.).

to its rules.⁷ A member who sold his shares was allowed to sue for the purchase price though he had not transferred it in the way required by the deed of trust.⁸

New shareholders are not liable for preëxisting debts unless they assume them expressly or impliedly.⁹ Those who were members at the time a contract was made are liable to the creditors upon it¹⁰ and dissolu-

⁷ *Rianhard v. Hovey*, 13 Ohio 300, 302.

On a shareholder's bill for winding up a joint stock company which was insolvent the plaintiffs tried to bring in former shareholders on the ground that the transfer of their shares had not been carried out as provided in the by-laws. Held: Since the transferees had been recognized as partners by the plaintiffs they cannot now set up informality in the transfer (p. 446). Equity would at any time have compelled a transfer and have compelled payment of dividends declared (p. 447). The fact that some of the plaintiffs have paid debts of the association does not put them in a better position. Doubtful if creditors with notice could complain (p. 448). *Wells v. Wilson*, 3 Ohio 425.

⁸ *Alvord v. Smith*, 5 Pick. 232, 235.

⁹ *M. W. Powell Co. v. Finn*, 198 Ill. 567, 64 N. E. 1036; *Beaman v. Whitney*, 20 Me. 413, 420; *Fuller v. Rowe*, 57 N. Y. 23, 26; *Shamburg v. Ruggles*, 83 Pa. St. 148; *Barndollar v. Du Bois*, 142 Pa. St. 565, 21 Atl. 988; *Thomas v. Clark*, 18 C. B. 662.

Issue whether shareholders in an unincorporated association were liable for loans made by the plaintiff before they received their certificates. In a very loose charge to the jury the court said that they were not liable as partners for preëxisting debts unless they accepted certificates with a knowledge of existing conditions that would amount to assumption of debts. *National Park Bank v. Nichols*, Fed. Cas. 10047 (C. C. — Ill.).

¹⁰ *Wadsworth v. Duncan*, 164 Ill. 360, 365, 45 N. E. 132 (bank); *Moore v. May*, 117 Wis. 192, 204, 94 N. W. 45 (coöperative store).

On a shareholder's bill for specific performance of a contract to convey land to an unincorporated association the question of the competency of witnesses under the old law arose. Held: Shareholders were liable as partners until transfer of their shares had been recorded on the books of the association as required in the articles of association. *Robbins v. Butler*, 24 Ill. 387, 426. But not where the transfers had been recognized by the association though not carried out according to its rules. *Rianhard v. Hovey*, 13 Ohio 300, 312.

In this connection the following case is of interest. A bond for a deed in an unincorporated association is void, for not being a corporation it could not so contract. To have been valid against the association it should have been executed by all the individual members either personally or by agent. *Vattier v. Roberts*, 2 Black. 255 (Ind.).

tion does not terminate liability on existing contracts.¹¹ A defendant is liable to one who dealt with the association while he was a member on contracts made before the plaintiff had notice of the defendant's withdrawal.¹² A shareholder in a formal association for profit, however, in most cases would prove to have been a dormant partner who is not bound, in order to avoid liability on future contracts, to give notice of dissolution to those who have dealt with the firm while he was a member.¹³

¹¹ "An association of this kind (insurance) cannot go out of existence while its contracts and obligations are outstanding." *Camden, etc. R. R. v. Pennsylvania Guarantors*, 59 N. J. L. 328, 35 Atl. 796; *Burgan v. Lyell*, 2 Mich. 102 (mining partnership, but the distinction usually made between such partnerships and ordinary partnerships was not noticed).

¹² *Grady v. Robinson*, 28 Ala. 289, 297 (bank); *Pettis v. Atkins*, 60 Ill. 454, 457; *McDowell v. Joice*, 149 Ill. 124, 137, 36 N. E. 1012 (land speculation); *Tyrrell v. Washburn*, 6 Allen 466 (coöperative store); *Farnham v. Patch*, 60 N. H. 294, 326; *N. Y. Bank v. Crowell*, 177 Pa. St. 313, 35 Atl. 613; *Tenney v. N. E. Protective Union*, 37 Vt. 64, 68 (coöperative store).

Cannot hold him on contracts made after knowledge of withdrawal. Bank depositor. *Wadsworth v. Duncan*, 164 Ill. 360, 45 N. E. 132.

Plaintiff must have known of his former membership. Bank. *Norwood v. Francis*, 25 App. D. C. 463, 472.

A member of a mining partnership sold his share. Held: He is not liable to employees hired subsequently or to prior employees who continued work with knowledge of the sale or of such facts and circumstances as were sufficient to have put a reasonably prudent person on inquiry as to the sale. But he is liable to former employees who continued to work without notice. *Kelley v. M'Namee*, 164 Fed. 369, 375 (C. C. A. — Alaska).

Member of a mining partnership like any other is liable after dissolution for new debts to prior creditors if he does not give them personal notice of retirement. So when the firm transferred to a corporation, recording the deed was not notice. *Dellapiazza v. Foley*, 112 Cal. 380, 384, 44 Pac. 727.

Tenants in common of a mine employed defendant to work it for them. After a time plaintiff notified the other owners and the defendant that he would not thereafter employ defendant. Plaintiff brings an action for a share in the proceeds of the mine in the hands of the defendant. Held: Plaintiff's notice amounted to a termination of the partnership and thereafter plaintiff was not liable for defendant's salary and defendant could not withhold it from the proceeds of the mine in his possession. *Slater v. Haas*, 15 Col. 574, 25 Pac. 1089.

¹³ *Grosvenor v. Lloyd*, 1 Met. 19.

It has been held that the shareholders at the time action is brought, not those who had been shareholders when the contract was made, are the ones entitled to sue upon it.¹⁴ In litigation between members an agreement that retiring members cease to be liable for debts and that incoming members are liable for outstanding debts should be enforced.¹⁵

§ 26. Dissolution by Transfer

Transfer of a share may be held technically to dissolve the association,¹ but subject to the implied agree-

¹⁴ Members of an unincorporated association with transferable shares sued an agent for money withheld. It was objected that one of the plaintiffs acquired his share by transfer. Held: "The implied promise of one holding money for such an association must be understood to be to make payment to those who are associates when the suit is brought." *Willson v. Oliver*, 30 Mich. 474.

¹⁵ In winding up the Home Grocery Co., the manager who had advanced money previously to pay debts of the association claimed reimbursement from the other members. Held: He did not have to make defendants certain persons who had withdrawn according to the articles of association, though they were members when the claim arose. There was no specific stipulation in the articles about liability of withdrawing members for existing debts, but court reached the result by an interpretation of the agreement. *Engvall v. Buchie*, 73 Wash. 534, 132 Pac. 231.

Such an agreement seems to have been implied from the fact that the shares were transferable in *Smith v. Virgin*, 33 Me. 148, 156.

Shareholders in an association or continuing partnership with transferable shares have no equity to compel former shareholders whose transferees have been accepted in their places by the plaintiffs to contribute to the payment of debts of the association incurred before their transfer of shares. They are liable only secondarily for such debts, the present shareholders being primarily liable. *Savage v. Putnam*, 32 N. Y. 501, 506.

¹ Lord Eldon suggested that unless the contrary was provided in the articles, a retiring member would have to notify all other shareholders before a dissolution resulted. *Van Sandau v. Moore*, 1 Russ. 441, 463. But the ordinary provision for transfer of shares would doubtless have satisfied him. Lindley says transfer results in a new firm. Lind. Part 7th Eng. Ed., p. 401. Acc. *McDowell v. Joice*, 149 Ill. 124, 135, 36 N. E. 1012.

An unincorporated bank failed. A depositor sued certain shareholders. Defendants pleaded non-joinder of various shareholders who

ment of the other members to continue as partners, so that the others who have not transferred their shares cannot escape future liability on that ground. Most courts, however, have held that transfer of a share in an unincorporated association with transferable shares does not dissolve the partnership.

The defendant, a corporation (which could not hold the real estate in question legally) organized the Ottawa Development Syndicate to buy land to give to factories and sell to raise cash to give to other factories. At a public meeting the syndicate was formed by subscriptions to an agreement of certain sums for certain pur-

had previously sold their shares to the association or to other shareholders and also brought a bill in equity for dissolution and receiver making the other members defendants. In only one case had the shareholders selling out had their transfer made on the books of the company as provided in its articles. Held: Members are partners and liable for debts of association unless they shifted liability in the very manner provided by the articles of association (p. 362). As between members a different rule would prevail from that as against third persons. After a sale, the remaining members tacitly formed a new partnership (p. 363). As between the remaining partners a new firm and implied assumption of debts (p. 364). If a depositor knew of change in membership, acquiesced in it and made other deposits, he could not hold the retiring member even though the transfer was not strictly according to rules of association (p. 364). A depositor with notice who are shareholders could hold all who were shareholders when he made his deposit (p. 365). Continuing partners have no right to require that retiring partners be made defendants (p. 365). *Wadsworth v. Duncan*, 164 Ill. 360, 45 N. E. 132. But see *Hossack v. Dev. Ass'n*, 244 Ill. 274, 91 N. E. 439.

An unincorporated bank with provision for transfer of shares. Held: After such transfer the continuance of the business without interruption does not vary the general rule that a transfer of a share in a firm is a dissolution and the new firm is not liable for the debts of the old nor do the creditors have any liens on the assets of the old. *Meadville Sav. Bank Estate*, 2 Pa. Super. Ct. 618, 645.

A bill by shareholders in a scythe manufacturing company for contribution and winding up. Held: A sale of his interest in the property of the company by the majority shareholder is a dissolution. It was not a sale of shares. Since this association had transferable shares, those who were shareholders at the time of dissolution are the ones who are liable for its debts. *Smith v. Virgin*, 33 Me. 148, 156.

poses stipulating that for each subscription was to be issued certificates in equal amounts of preferred and common stock, preferred to be exchanged for lots of like value and common "to represent the interest of the holder in the proceeds and profits of the undertaking, both of said certificates to be transferable." Title to the land was to be taken in name of the trustee. It was agreed that the defendant should "have full and exclusive management and control of said lands and of the action of the trustee in regard thereto and of all business connected with the undertaking." The plan was executed and the plaintiff was the holder of many shares of both kinds, but the rest of the preferred shareholders had exchanged shares for land. The common certificate recited that it only entitled the holder to his proportion of any proceeds or profits of the undertaking. On a bill for the winding up of the association and sale of the remaining lands asking to set aside certain conveyances and alleging mismanagement, the court held that the subscribers in many respects should be held partners. "The legal status of unincorporated societies and voluntary associations has not been very satisfactorily determined on many points. While the courts will generally treat the members as ordinary partners and the associations as partnerships, they will, as far as possible, give effect to the articles of association or agreement among the members themselves when they themselves are the only ones interested. If such an association be organized for pecuniary profit so far as the rights of third persons and liabilities of the members to strangers are concerned, such association is usually considered as a partnership. . . . This syndicate agreement made the subscribers substan-

tially a stock company. There is nothing illegal in such an agreement with transferable shares. The transferability of the shares makes such an association different, not merely in magnitude but in other ways, from ordinary partnerships because the association is not based upon mutual trust and confidence in the skill, knowledge and integrity of the partners. The sale of shares by a member, the shares being transferable, is not a dissolution, and the death of a member is not a dissolution. That the shares are transferable is evidence of the intent that such death or transfer shall not result in a dissolution.”²

In another case the plaintiff sued for goods sold a coöperative store of which the defendant had been a member. He had moved out of town in 1859, giving no notice of withdrawal from the association to the plaintiff or his associates. In 1860 another member had died and the defendant claimed that this dissolved the association and that he was not liable for goods sold thereafter. It was held that the defendant was liable. Even if as between himself and his associates he was not a member, the plaintiffs having dealt with the association while he was a member were entitled to treat him as such till they received notice of withdrawal. The court said that it was not necessary to decide whether the association was strictly a partnership or not, since it is found as a fact that it was intended to have perpetuity and not to be dissolved by death or withdrawal of any member. “Hence, neither the death or withdrawal of any member would affect the liability

² The court further held that it could not require dissolution at any time, because it could not cancel the partnership agreement contrary to its terms and it was evident that there was no definite time for closing the syndicate. *Hossack v. Development Ass'n*, 244 Ill. 274, 291, 292, 91 N. E. 439.

of those who continued to be members for debts contracted in the name and for the benefit of the association.”³

One well-established exception to the general rule of dissolution of a partnership by transfer of a share is that applied in the case of mining partnerships. At an early date mines were operated by joint stock companies to which the courts said the rule of *delectus per-*

³ *Tenney v. New England Protective Union*, 37 Vt. 64, 68.

Transfer of share does not effect a dissolution. *Carter v. McClure*, 98 Tenn. 109, 116, 38 S. W. 585 (coöperative store).

Three persons signed articles forming an association to publish *New York Times*. The capital and assets were divided into shares. It was stipulated that shares might be sold after being offered to the association but that purchaser could not participate in affairs of association, and until new certificate was issued to him should have no right in profits, and even after that should have no voice in conduct of business but only the right to receive the share in profits allotted to him. Held: Agreement contemplates no dissolution or sale. Vendor still to remain partner as to management. Because not first tendered to the association the sale was not valid as between association and vendor or vendee, though valid as between them. Vendee would have to get power of attorney from vendor to get the profits. On the dissolution of the association this limitation ceased and the trustees in liquidation are under obligation to vendee of the shares. *Harper v. Raymond*, 3 Bosw. (N. Y.) 29, 39.

Association of owners of mill privileges to build a reservoir formed under a statute. Held: Withdrawal did not effect a dissolution. Could withdraw only as specified in the articles. *Troy Iron, etc. Factory v. Corning*, 45 Barb. (N. Y.) 231, 243.

Held: No dissolution where articles of partnership permit transfer of shares but rights of third parties not affected. *Merrick v. Brainerd*, 38 Barb. 574, 578.

A land syndicate. Heirs of deceased shareholder brought petition for partition of the land held by the trustees. Held: Have no interest in the property, only in the profits. If a partnership, it is not terminated by death or transfer of shares, for *delectus personae* was unimportant consideration. *Horner v. Meyers*, 29 Ohio Weekly Law Bulletin 403.

By-laws of a coöperative partnership association provide for withdrawal of old and reception of new members. A general assignment by a shareholder is such a withdrawal and purchaser at assignee's sale gets only vendor's rights as a withdrawing member. Though ordinarily a partner's withdrawal effects a dissolution, this may be modified by articles and was here. *Swoope v. Wakefield*, 10 Pa. Super. Ct. 342, 351, 44 Weekly N. C. (Pa.) 209.

sonae did not apply.⁴ This doctrine has been developed into the modern law of mining partnerships, as previously noted,⁵ in which it is well settled that transfer of a share whether *inter vivos* or on death or bankruptcy of the shareholder does not work a dissolution. As was said by Judge Field, "Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships, and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was, therefore, recognized as applicable to the relation to each other of members of a mining association. The *delectus personae* which is essential to constitute an ordinary partnership has no place in these mining associations."⁶ It is suggested that this

⁴ Leach, M.R.: "It is true that a mining concern differs in some particulars from a common partnership — the shares are assignable and the death or bankruptcy of the holder of shares does not operate as a dissolution — but it has been repeatedly held to be in the nature of a trading concern." *Fereday v. Wightwick*, 1 Russ. & M. 45, 49.

⁵ See § 7 and § 22, notes 2 and 3.

⁶ *Kahn v. Smelting Co.*, 102 U. S. 641, 645, 26 L. ed. 266; see acc. *Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 S. Ct. 355; *Loy v. Alston*, 172 Fed. 90, 92 (C. C. A. — Mo.).

"One member of a mining partnership has the right without consulting his associates to sell his interest to a stranger." "There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner to a stranger or to one of the associates, of his share in the property and business of the association." Hence a partner has no right to share in the purchase by another partner of the shares of a third. *Bissell v. Foss*, 114 U. S. 252, 261, 29 L. ed. 126, 5 S. Ct. 851.

"Such is the uncertainty of mining operations that few are willing to risk all their means in such undertakings; and it is therefore customary for a number of persons to unite in the enterprise; and often

doctrine has no peculiar relation to the business of mining, but is generally applicable to partnership asso-

the interests owned by each differ greatly in amount according as each is able to furnish means, or is willing to take the risk. As a general rule it is impracticable for each proprietor to work his interest in the mine separate from the others; hence arises the necessity for an organization of some kind to work the mine such as a corporation, joint stock company or mining partnership. The company in the present case is one of the latter class. As each owner has a right to sell and convey his interest at any time, and as in ordinary partnerships such sale would dissolve the partnership and compel a winding up and settlement of the business which would be most disastrous to a mining enterprise, it has become an established principle that such sale does not dissolve a mining partnership but it continues as before. Such a radical change in the law of partnership necessitates other changes. One result is that new members are thus introduced into the company without the consent and often against the wishes of the other members; and it would be most unjust to subject each proprietor to personal liabilities which might sweep away all his property, created against his consent by those who became members against his wishes. Hence arises the necessity of establishing new rules for such partnerships differing from those regulating ordinary partnerships, especially those relating to the power of one member or a majority of the members, or of the superintendent or managing agent to make contracts binding upon the company or its members and also regulating the extent and nature of the liability of each proprietor for the company debts as between themselves and third persons." Hence managing agent did not have power to bind members on a note given for lumber for the mine. *Skillman v. Lachman*, 23 Cal. 198, 206.

Bill for dissolution and accounting of a mining partnership and conveyance of share in the mine. Held: Mining partnerships combine some of the incidents of tenancies in common, — a species of qualified partnership (p. 495). Plaintiff entitled to relief whether called partnership or not (p. 496). *Settembre v. Putnam*, 30 Cal. 490.

Acc. with Field's statement (p. 48). Here the partnership was in working the mine, the title to the mine not being contributed as capital but being held as tenants in common (p. 49). As between the partners, the incoming partner is not liable for prior firm debts (p. 51). Majority rule (p. 52). *Patrick v. Weston*, 22 Col. 45, 43 Pac. 446.

Elaborate dictum on mining partnerships begins on page 350. Rule as to transferable shares and limited authority (p. 353). Otherwise the general rules of partnership apply and so as to real estate (p. 367). What is partnership property may be proved by parol regardless of the statute of frauds (p. 358). *Meagher v. Reed*, 14 Col. 335, 24 Pac. 681.

An assignment by a mining partner of his interest in the metals and ores that might be acquired as his share in the company did not transfer his share and did not make the transferees partners. *Phillips v. Jones*, 20 Mo. 67, 69.

ciations with transferable shares. This is shown by the decisions that hold a mining partnership may be organized on the principle of *delectus personae* and be subject to the ordinary rules of partnership.⁷ The Massachusetts court has not expressly said whether transfer of a share effects a dissolution or not, but has said that transferability of shares is legal.⁸

§ 27. Dissolution by Death

Does death dissolve an association for profit? Technically, it may be a new association after the death of each member, but by joining the association there is an implied agreement to continue in each new association thus formed,¹ or, as has been said, less evidence of

⁷ The agreement of partners to work a mine may be a contract of partnership in the ordinary sense, with all the usual limitations, including the *delectus personae*. *Decker v. Howell*, 42 Cal. 636, 642.

"Where in a partnership the *delectus personae* exists and the parties intend that the confidential relations of partners shall exist and so treat the business relation, the mere fact that the business engaged in is the operation of a mine should not alter the liability of the individual partners." *Dailey v. Fitzgerald*, 17 N. M. 137, 125 Pac. 625, 631.

A mining partnership may be formed in two ways: (1) By operation of law where there is no partnership agreement but coöperation by co-owners in the working of mining property. (2) By agreement of the co-owners. In the former there is no *delectus personae*. In the latter there is. Here it was a commercial partnership and sale of an interest worked a dissolution. *Freeman v. Hemenway*, 75 Mo. App. 611, 616.

An agreement of three tenants in common of a mine "to mine and operate said mining property as a company" created a partnership (p. 655). No one can become a member of a firm without the knowledge and consent of all the partners (p. 654). *Bybee v. Hawckett*, 12 Fed. 649 (C. C. — Ore.).

⁸ *Phillips v. Blatchford*, 137 Mass. 510; *Ashley v. Dowling*, 203 Mass. 311, 89 N. E. 434.

¹ *Tyrrell v. Washburn*, 6 Allen 466. In a case of joint stock association which apparently never got beyond the subscription stage, it was said that the partnership was dissolved by the death of a subscriber. It did not appear whether the shares were to have been transferable. *Vilas v. Farwell*, 9 Wis. 460, 462.

an intent to continue the business is required.² No distribution of the assets can be compelled, but the business continues as before.³ Upon death of a member where it is provided that "the representative of the deceased shall succeed to the rights of the deceased in the certificate and the shares it represents, subject to the declaration of trust," there is imposed on the estate of the deceased the liability the deceased would have incurred towards debts regardless of whether the executor decides to become a member of the firm or not. In an ordinary partnership the estate would not become liable for future debts unless the executor decided to become personally a partner, even where the articles had stipulated that he should become a partner. But a majority of the court held that in an association there was by this provision an implied agreement of indemnity by each partner against the debts of the association as long as he held his shares, which agreement could be enforced against the estate of the deceased.⁴ Some courts without entering into such refinements simply hold that an unincorporated association with transferable shares is not dissolved by death of a shareholder.⁵

² *Machinists' Bank v. Dean*, 124 Mass. 81, 84.

³ *Taber v. Breck*, 192 Mass. 355, 361, 78 N. E. 472.

⁴ *Phillips v. Blatchford*, 137 Mass. 510, 514. Of course the executor does not become a member or personally liable until he consents. *Wells v. Murray*, 4 Ex. 843, 868.

⁵ *Willis v. Chapman*, 68 Vt. 459, 35 Atl. 459 (cheese factory); *Carter v. McClure*, 98 Tenn. 109, 116, 38 S. W. 585 (coöperative store).

"The only distinctions between a trading company and an ordinary co-partnership are that the capital of a joint stock company organized for trading purposes is usually divided into shares and a transfer of a portion of the shares without the consent of the other shareholders on the death of a shareholder does not work a dissolution as it would in an ordinary partnership unless it is so stipulated in the articles of agreement." *Hunnewell v. Willow Springs Co.*, 53 Mo. App. 245, 248.

A joint stock association was formed to deal in mineral lands. Large

§ 28. Winding up Informal Associations for Profit

A member may compel dissolution and liquidation against the will of the majority when the time fixed

stockholder died. After his death valuable deposit discovered and land sold at great advance over cost. Issue whether dividend from this went to life tenant as income or remainderman as principal. Trustees held legal title. Shares transferable. Annual meetings. Held: The company is a partnership. Whatever its members' liability to third persons may be, it "is an artificial juridical person capable of acquiring, holding and selling property" (p. 58). The relation of stockholders is fixed by their agreement. As between themselves they are liable for losses in proportion to stock. Have no power to use the name of the company, interfere with its business or bind it in any manner. This they have entrusted to trustees. Had only a right to elect trustees and share in profits. No title in land as tenant in common or otherwise. Interest in it is personal estate, to be ascertained only by an account (p. 59). Company not dissolved by member's death. Dividend is personal estate and if it represents profit made since the death of a member it is like other income of his estate. The increased price came not from change in actual value, but from correct knowledge of that value. This occurred after member's death. Company formed not to mine, but to buy and sell. Hence income (p. 61). *Oliver's Estate*, 136 Pa. St. 43, 20 Atl. 527.

Association under declaration of trust to buy and sell a tract of land. Transferable shares. Only eight certificates. Action for commission against shareholders. Held: At common law joint stock associations are legal. "Such an association . . . not organized for engaging in the real estate business but for the purpose of acquiring and holding title to a particular piece of real estate, is not a general business partnership. It is not a violation of the Constitution or statutes for a number of people to get together to acquire a particular piece of property and place the title of the same in the name of a trustee whose powers and authority are definitely limited and defined and subject to instructions from the shareholders either directly or individually through a board elected by the shareholders at regularly constituted meetings of the shareholders. This constitutes simply a definition of the trusts and powers subject to which a particular piece of real estate is held" (p. 380). A partnership may stipulate that death shall not dissolve it and waive *delectus personae* (p. 382). This is a distinction between joint stock companies and ordinary partnerships. "All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors and that a shareholder as such has no power to contract for the company" (p. 384). "In joint stock companies the shareholders have no powers as agents unless such powers are granted either expressly or by implication or by acquiescence of such shareholders or association" (p. 368). Hence held that death of president did not dissolve the association and that the secretary had no power to employ the plaintiff (p. 390). Dissent:

by the articles expires ¹ or when the purpose of the enterprise has become impracticable.² Dissolution has been decreed on partition of a minority wrongfully excluded from the property and business by the majority.³ It was denied in one case where a majority of the shareholders opposed dissolution and where the loss from a winding up would exceed that of the plaintiff on

That majority have created a hybrid organization half corporation and half partnership (p. 399). *Spotswood v. Morris*, 12 Idaho 360, 85 Pac. 1094, 1102.

¹ *Clerk's Inv. Co. v. Sydnor*, 19 A. C. (D. C.) 89, 96; *Mann v. Butler*, 2 Barb. Ch. 362, 368.

² *Von Schmidt v. Huntington*, 1 Cal. 55.

A winding up was ordered of an unincorporated cheese factory, supposed to be run for profit, but which had made no profit for twenty-three years. *Willis v. Chapman*, 68 Vt. 459, 35 Atl. 459.

Land was conveyed to the members of a joint stock association to build a hotel. Separate deeds to each provided that it should be held without partition. Held: This was a valid condition, not a perpetuity, for each could dispose of his share. Waived a statutory right. Failure to hold meetings for a dozen years is not of itself a dissolution. Hence petition for partition denied. *Hunt v. Wright*, 47 N. H. 396, 402.

A joint stock association for holding county fairs did no business for eight years. It owned real estate. Then the last president purported to reorganize under the same name. New members were admitted and new shares issued, new property acquired and debts incurred. Some of old shareholders did not have actual notice of the meeting of reorganization. The new association purported to convey the land of the old. Held: Conveyance void. Separate associations. The old had practically become extinct and should have been wound up. *Allen v. Long*, 80 Tex. 261, 267, 16 S. W. 43.

Dissolution of a mining partnership was refused on petition of a purchaser of a share who alleged merely lack of harmony between the partners as to the further operating of the lease. He had a perfect remedy by sale of his share. *Blackmarr v. Williamson*, 57 W. Va. 249, 254, 50 S. E. 254.

³ When a majority shareholder takes possession of the property and business of the association and excludes minority therefrom and no board of directors is elected as contemplated by the agreement, the majority may petition for dissolution and winding up. *Werner v. Leisen*, 31 Wis. 169, 171.

Bill for dissolution of partnership of a ferry association by a trustee excluded by others from his office. Articles provided for election of trustee on death or resignation, but no fixed term of office. Plaintiff never resigned, but voted for self and others at an election. Held: Still trustee and entitled to maintain this bill. *Berry v. Cross*, 3 Sandf. Ch. 1, 5.

a sale of his shares.⁴ The petition should ask for an accounting,⁵ and all shareholders and creditors are proper parties defendant.⁶ A bill in equity for the appointment of a receiver is appropriate procedure⁷ and in such a suit contribution by the other members to the debts of the association will be enforced.⁸ When some of the shareholders are insolvent or out of the jurisdiction, the rest are liable in proportion to their shares.⁹ As to creditors, of course, each is liable for

⁴ *Hinkley v. Blethen*, 78 Me. 221, 3 Atl. 655.

⁵ A shareholder in a joint stock company cannot bring an action against the company to compel payment to him on liquidation of the par value of his share and dividends, but must proceed to an accounting after dissolution. *Lesseps v. Architect Co.*, 13 La. 414.

The proper procedure to wind up a mining partnership is accounting and dissolution. *Nisbet v. Nash*, 52 Cal. 540, 550.

⁶ *Randolph v. Nichol*, 74 Ark. 93, 84 S. W. 1037.

⁷ *Clerk's Inv. Co. v. Sydnor*, 10 A. C. (D. C.) 89, 96 (real estate investment association); *Henry v. Simanton*, 64 N. J. Eq. 572, 54 Atl. 153.

⁸ *Hodgson v. Baldwin*, 65 Ill. 532, 537 (coöperative store. In this case the court in fact enforced the principle of exoneration and not merely contribution). See § 24, note 16 and § 31, note 11.

Though no calls or assessments were made as contemplated by a subscription paper, a bill for contribution may be brought after dissolution of the partnership and the personal representatives of a deceased subscriber are necessary parties. *Still v. Holbrook*, 23 Hun 517, 519.

The same equitable rules are applicable to the winding up of a mining partnership for oil drilling as a general partnership and the firm assets are to be exhausted before individual liability is enforced. *Bartlett v. Boyles*, 66 W. Va. 327, 332, 66 S. E. 474.

⁹ A bill in equity for contribution between members of a joint stock ferry company is maintainable. The debts were contracted for the benefit of the company and as between themselves they were ultimately liable in proportion to their interests. As to creditors, they were liable for the whole. When some of the members are insolvent or out of the jurisdiction the plaintiff may recover in equity a contribution for the whole from those who remain. *Whitman v. Porter*, 107 Mass. 522, 524.

On proceeding for winding up an express company all solvent members must contribute to the debts *pro rata* disregarding the insolvent. *Morrissey v. Weed*, 12 Hun 491, 496.

Plaintiff bank was a member of a joint stock company running a mill and loaned money to it for which it sues members. Held: Fact that it was a member or that the membership was *ultra vires* is no de-

the whole.¹⁰ If there is a surplus, the distribution follows the terms of the existing agreement between the members.¹¹

§ 29. Limitation of Liability of Shareholders

It is familiar law that partners may by agreement modify as between themselves their common law obligations,¹ but that such modifications will not be bind-

fense. Solvent members liable *pro rata* their shares. *Cameron v. First Bank*, 34 S. W. 178 (Tex.).

A purchaser of shares in an unincorporated bank which is insolvent cannot claim set-off of the price he paid for his shares in an accounting between the partners. His payment did not go into the capital of the firm. He is not liable for debts of the old firm. *Barndollar v. Du Bois*, 142 Pa. St. 565, 21 Atl. 988.

¹⁰ *Whitman v. Porter*, 107 Mass. 522, 524.

¹¹ Winding up a joint stock association formed to exploit land. Held: "Each holder of a share of stock was in equity a joint owner with the other shareholders and a partner as to creditors of the company who were not joint owners" (p. 28). The assets should be distributed to those who appeared on the books to be shareholders excepting shares owned by the association and shares of the founders who had guaranteed dividends to the others in amount exceeding what they would get on the distribution (p. 30). Appeal of Moss, 43 Pa. St. 23.

After a voluntary dissolution of a mining company, a shareholder cannot claim the profits made by the members working severally, nor can one who advanced him money to buy his share. *Scott v. Clark*, 1 Ohio St. 382.

Shareholders in a real estate speculation agreed to take certain shares at a fixed price and also to take the shares remaining unsold. One subscriber refused to enter into the latter agreement. Held: He cannot when the speculation succeeds claim any share of the profits on these excess shares but that in the accounting the shareholders who agreed to take these shares are not entitled to have the profits applied to their payment until the profits are divided. *Douglas v. Merceles*, 23 N. J. Eq. 331.

An informal association bought real estate with subscriptions of certain members, took title in trustees and issued subscribers' certificates for their subscriptions, agreeing to pay interest. Later consolidation and new certificate failed to recite interest and said "entitled to shares in the real estate." On winding up, question is to whom proceeds of real estate go. Held: Trustees really held for the association and the certificates merely evidenced a loan secured by the real estate. Hence proceeds first go to pay loan and the surplus goes to association. *Crawford v. Gross*, 140 Pa. St. 297, 323, 21 Atl. 356.

¹ *Leavitt v. Peck*, 3 Conn. 125.

An unincorporated company to build and operate a steamboat and

ing on those who deal with the firm without notice thereof.² It is usually said that they are binding on those who do have notice.³ When we come to apply

wharf was formed by an informal subscription paper. It was understood that the liability of the parties was to be limited to the subscriptions. The committee in charge incurred debts and brought a bill for contribution. Held: The limitation on liability was binding as between the partners and the committee had no authority to incur this debt. Dictum that such limitation is not binding on creditors without notice. Whether a creditor with notice is bound by it is said to be doubtful. *Danforth v. Allen*, 8 Met. 334, 342. Acc. *Clark v. Reed*, 11 Pick. 446, 450 (stage line).

Defendant was member of a band. The association was not incorporated. It had by-laws which provided that "If any member shall leave the band, he leaves all his interest in the band." Defendant retired from the band and carried off an instrument claimed by the band and on refusal to surrender was sued in trover. Held: Defendant subscribed to by-laws in writing and so assented thereto. "This is a valid agreement between the members and binding upon them. The consideration upon which the promise of each is founded is the promise of the rest to do the same thing." Like a subscription paper. Though this is a partnership and a partner cannot sue another at law while partnership affairs are unadjusted, here he has voluntarily parted with his interest in its property and may be sued. *Danbury Cornet Band v. Bean*, 54 N. H. 524, 526.

A farmers' union voted to "start a store." Plaintiff was employed as manager and gave bond. He acted under control of a board of directors elected by the Union and conducted business under the name of the Union, but contracted and incurred liabilities in his individual name for which he seeks contribution from the members. Held: The facts show that the members did not contemplate personal liability for the debts of the association but understood that their liability was limited to their subscriptions and that changes of members were contemplated. As between themselves this is not a partnership. (Strong dissent of one judge that it was a partnership since it was an association engaging in business for profit.) *McDonald v. Fleming*, 178 Mich. 206, 144 N. W. 519.

² *Tyrrell v. Washburn*, 6 Allen 466; see *Manning v. Gasharie*, 27 Ind. 399, 415; *Walburn v. Ingilby*, 1 My. & K. 61, 76.

Treasurer of a joint stock company overdrew its account with the plaintiff to pay for work within the scope of the association. Held: Shareholders liable as partners. Their limitations of liability in their articles were unknown to the plaintiff. *Tradesman's Bank v. Astor*, 11 Wend. 87, 89.

³ A joint stock association running a country store in its articles forbade purchase on credit. Officer delivered copy of articles to vendor and then bought on credit. Held: Vendor cannot sue members as partners. Notice of limitation on authority of agent was binding. Reception of the goods was not ratification. Nothing in that to notify defendants. *Hutchin v. Kent*, 8 Mich. 526, 528.

this rule to the highly developed modern association organized under a declaration of trust in which it is desired to abolish all personal liability, many courts have hesitated to say that mere notice is sufficient.

§ 30. Effect of Notice

There is no decision in Massachusetts, for example, that if partners agree that certain of their members shall not be liable to creditors in any form for the debts of the firm, the creditors, even contracting with notice of that provision, would be prevented from joining such members as defendants.¹ Much less that a provision that no member of the firm should be personally liable and that a creditor's only remedy would be to attach firm goods would be enforced by the court. The attitude of the court towards such provisions is suggested by the following from the opinion in *Hussey v. Arnold*: "We do not attempt to determine whether all the provisions of this agreement are enforceable in the courts or whether there are such considerations of public policy involved in an attempt of this kind to do business without legal liability of anybody for debts incurred by the trustees as merit consideration by the legislature."² In England we find a number of cases dealing with joint stock companies where limitations

¹ See *Danforth v. Allen*, 8 Met. 334, 342.

There was apparently no limitation on the liability of shareholders in *Bodwell v. Eastman*, 105 Mass. 525, 527, and the other cases of the same period relating to express companies. In *Cook v. Gray*, 133 Mass. 106, 109, some very simple articles of association were interpreted as not intended to limit liability of stockholders and they were allowed joined as defendants in contract at law. Under Massachusetts statutes it would not be necessary to join all members of an association even where non-joinder is pleaded in abatement. *Bank of Topeka v. Eaton*, 95 Fed. 355 (C. C. — Mass.).

² *Hussey v. Arnold*, 185 Mass. 202, 204, 70 N. E. 87.

similar to those above quoted, although not the form now most common, were construed. As against a director of the company³ and a firm in which a director was partner,⁴ such a limitation of liability was held to prevent recovery. So as between policy holders of a mutual insurance association where the liabilities are wholly between members.⁵ It was held not to bind creditors in the absence of express contract.⁶

A contrary result was reached in the United States Circuit Court for Massachusetts. Here the trustees did refer to the deed of trust in their contract, though not expressly contracting against liability of shareholders. It was an action at law on a note of A, "trustee, as trustee under a declaration of trust dated," etc. The court held that this obligated the plaintiff "by its implied agreement in accepting the note to abide by the terms of the articles of association. Whether or not the plaintiff examined the articles of association or knew their contents is of no consequence because this express provision required it to do so or take the hazard of not doing it.

"Therefore the only question is whether or not this implied stipulation limiting its remedy to the general assets of the association and the property specially pledged to it, is contrary to the rules of law. Of course a stipulation in an instrument which fundamentally

³ But directors were allowed to charge against the company a loan obtained to carry on the business after capital was exhausted. Some evidence of consent of shareholders. *The Norwich Yarn Co.*, 22 Beav. 143.

⁴ *The Worcester Corn Exchange Co.*, 3 De G. M. & G. 180.

⁵ *London Marine Ins. Ass'n*, L. R. 8 Eq. 176.

⁶ *Greenwood's Case*, 3 De G. M. & G. 459, 476, 482. See *ex parte Mendeth*, 32 L. J. Ch. 300. Restrictions on liability of partners bind only themselves as to their right to contribution, *Hawken v. Bourne*, 8 M. & W. 703; *Smith v. Hall Glass Co.*, 8 Com. B. 668, 11 Com. B. 897; *Hallett v. Dowdell*, 18 Q. B. 2, 43, 53.

violates its essential nature must sometimes be rejected by the courts. For instance, if any individual or partnership should stipulate in his or its pecuniary obligations that he or it should not be personally liable thereon, without at the same time mortgaging or pledging property or giving some other specific lien for security, it might be difficult for the law to regard the stipulation, because in that event as there would be no lien that the law could enforce, the holder of the obligation would be left without remedy unless he could proceed by judgment against the obligor; and the result, if sustained, would be an obligation which in law is no obligation. The present case, however, assimilates itself to the large class of cases where certain property being pledged in some form for the security of a debt, the parties have been at liberty to stipulate that the owner of the debt should look only to the property thus pledged. In the present case not only did the bank of Topeka have specified assets given it for its security but the entire property of the association was held in trust and therefore subject to administration by the chancery courts, which could apply it equitably and proportionally to the discharge of obligations incurred by the trustee as contemplated by the express direction of the articles of association that the debtors of the trust should look for payment solely to its property." Hence individual shareholders were held not liable.⁷ In another case in the Federal Court

⁷ *Bank of Topeka v. Eaton*, 100 Fed. 8 (C. C. — Mass.), *aff'd* by C. C. A. 107 Fed. 1003; *acc. Hotchin v. Kent*, 8 Mich. 526, 528; *Industrial Co. v. Texas*, 31 Tex. Civ. App. 375. But see *Danforth v. Allen*, 8 Met. 334, 342. It has been held where there was reference in an oral contract made by an agent of an unincorporated association to the articles of association which contained such a limitation of liability, that a plaintiff could not sue a member on the express contract because the agent had limited authority only, but that he

there is a dictum in favor of the enforceability of such provisions.⁸

If we accept the doctrine that mere notice of limitation of liability is sufficient, the question arises, what kind of notice? In one case it was said that notice by publication was sufficient.⁹ From the tenor of the other decisions and the hostility of many courts to the whole principle, it seems likely that this case would not now be followed anywhere. Recording the deed of trust in the registry of deeds would be notice only to those dealing with the real estate. The statutory requirement in Massachusetts of filing a copy of the deed of trust with the town clerk and commissioner of corporations is not

could sue on a *quantum meruit* either the agent or the members of the association individually. *Sullivan v. Campbell*, 2 Hall (N. Y.) 271, 276.

A member of a clearing house (unincorporated association) acted as agent for another bank in clearing checks under rules of association which provided that the arrangement should not be discontinued without previous notice which should not take effect until the exchanges of the morning following the receipt of such notice. The principal failed and the agent bank gave notice and applied securities it held in reimbursement of checks cleared the next morning. The receiver of the failed bank claimed these securities and said the rule was invalid because it resulted in an unlawful preference. Held: Banks had a right to form this association and be bound by rules which expressed the contract between them. Such agreements must be enforced if not in conflict with rules of law. There was nothing objectionable in the agreement. The agency created a three party contract between the two banks and the association. *O'Brien v. Grant*, 146 N. Y. 163, 173, 40 N. E. 871.

⁸ A judgment was obtained against agents of an association personally for work done for this association. They were also shareholders. They contended they could not be held because of provisions in the articles of association that every person dealing with them "disavows having recourse on any pretence whatever to the person or separate property of any present or future member of the company." Held: At most only a contract not to enforce his judgment against them personally. If he attempted to break it, equity might grant an injunction. *Davis v. Beverly*, 2 Cranch, C. C. 35.

⁹ Bill in equity to enforce notes of a banking association whose articles stipulated that only the funds of the bank should be liable. These articles had been published and a copy was annexed to the bill. Held: That by reason of publication the plaintiff must be presumed to

thereby made notice to any one.¹⁰ It has been said, in the case of what was really not a partnership but a non-profit association, that the nature of the association may give notice of limitation of liability of members.¹¹ The same statement has been made as to mining partnerships.¹² The time may come when the custom of limiting liability of members of these unincorporated associations is so familiar that courts which accept the doctrine of limitation of liability by notice will find constructive notice from mere knowledge by the creditor that he was dealing with an association for profit.

§ 31. Express Stipulation in Contracts with Third Parties

It is evident, however, from the form of limitation now favored that reliance is not placed on the doctrine of notice alone. It is intended to incorporate the abandonment by the creditor of his common law rights in an express contract. The tendency of the decisions is to uphold this if sufficiently clear; and this, it is submitted, is the correct principle. Of course, one contracting with trustees of such an association may expressly agree that he will not hold the trustees to personal liability. In that case he cannot sue the trustees at all at

have known of the provision when he bought his notes. Hence he can have relief in equity against the funds in the hands of the trustees but not against the shareholders beyond the subscriptions as called for. A decree was later entered, the reason for which is not clear, and the case was later reversed in 2 Pet. 482 on questions of procedure. *Riggs v. Swann*, Fed. Cas. 11831.

¹⁰ Acts of 1909, ch. 441, as amended by Acts of 1913, ch. 454. See also Acts of 1913, ch. 596.

¹¹ *Volger v. Ray*, 131 Mass. 439.

¹² *Skillman v. Lachman*, 23 Cal. 198, 206. But it would seem that this case and others like it are due to a misunderstanding of the English cases which held merely that because it was not a trading partnership its agents had no authority to bind it by negotiable instruments. See § 22, note 3.

law.¹ It has been hinted that the beneficiaries might be liable in equity as principals.² If the contract expressly provided, however, that no action could be brought against any one, but the only remedy of the contractor was to reach the trust fund, it is doubtful if such provision would be held binding.³

There is an early decision in Pennsylvania which accepted with reluctance the right to forestall individual liability by contract. Notes were issued by an unincorporated banking association containing the stipulation that they were payable "out of their joint funds, according to the articles of association." Gibson, J., said: "I see no reason to doubt, but they may limit their responsibility by an explicit stipulation made with the party with whom they contract and clearly understood by him at the time. But this is a stipulation so unreasonable on the part of the partnership and affording such facility for the commission of fraud, that unless it appears unequivocally plain from the terms of the contract, I will never suppose it to have been in the view of the parties." He therefore held the members liable.⁴

¹ *Shoe & Leather Nat. Bank v. Dix*, 123 Mass. 148, 151; *Glenn v. Allison*, 58 Md. 527 (agreement implied from reference in a mortgage to the deed of trust).

² *Hussey v. Arnold*, 185 Mass. 202, 204, 70 N. E. 87. But see *Taylor v. Davis*, 110 U. S. 330, 28 L. ed. 163, 4 S. Ct. 147.

³ *Hibbs v. Brown*, 190 N. Y. 167, 186, 196, 82 N. E. 1108.

⁴ *Hess v. Werts*, 4 Serj. & R. 356, 361. Acc. *Witmer v. Schlatter*, 2 Rawle 359.

Action on certificate of deposit issued by an unincorporated savings association. The plaintiff had been a member fourteen years before. Its articles stipulated that no contract could be made on its behalf unless it contained a stipulation against personal liability of members. No such stipulation was inserted in these certificates. Held: Such stipulations must be shown by the defendant to have been made part of the contract to be enforceable. "In all partnerships it is competent for any one dealing with the firm to contract not to hold the partners liable to an unlimited extent, but the *onus probandi* is on the firm and

In a New York case relating to a statutory joint stock association the majority of the judges seem to have felt that such a provision was void as against public policy.⁵

The English courts, however, uphold such contracts.⁶ They say that the individuals who sign the contract personally contract that the capital stock or funds of the company shall be applied to answer the claim on the

if they fail in establishing their case the general rule of unlimited liability applies to them as a matter of course." *Beaver's Adm. v. McGrath*, 50 Pa. St. 479, 486, 488.

"This company (insurance underwriters) or association was not incorporated and was in no wise exempted by law from partnership liability, except as it should by agreement with the insured actually and explicitly so exempt itself. This does not mean that seemingly constructive notice which is so contrived and intended as to be hidden in the letter and not to be perceived or suggested until searched out of its lurking place after a loss. It means a notice so plain and fair that the party to be charged with it either receives it or it is his own fault if he does not." *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143, 150, 62 N. E. 167.

⁵ A statutory joint stock company of New York, the Adams Express Company, issued bonds stipulating against personal liability of members and making them payable only out of the funds of the company. The issue was whether the provision limiting payment to the fund made them non-negotiable. Held: It did not. *O'Brien* on the ground that they were practically corporations by statute. *Werner, Bartlett and Cullen* on the ground that the limitation of liability was against public policy and void. "Personal liability preserved by the legislature and recognized by the courts." *O'Brien* intimated that if it were an ordinary partnership he might agree on that. *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108.

But see *Warner v. Beers*, 23 Wend. 102, 151, 152, apparently *contra*. (This case contains a long discussion of the early associations in England and New York.)

⁶ A contract of insurance stipulated that "the said policy or anything therein contained shall in no case extend or be deemed or construed to extend to charge or render liable the respective proprietors of the said company or any of them," etc., "to any claim or demand whatsoever in respect of the said policy or of the assurance thereby made beyond the amount of their, his or her individual shares or share in the capital stock of the said company, but that the capital stock and funds of the said company shall alone be charged and liable to answer all claims and demands by virtue of the said assurance or incident thereto." Held: To preclude any action at law against an individual shareholder. *Halket v. Merchants, etc. Ass'n*, 13 Q. B. 960; *Hallett v. Dowdell*, 18 Q. B. 2, 43, 54; *Athenaeum Life Assurance Society*, 4 H. & J. 517.

contract. It is also held that each shareholder may be sued and recovered against to the extent of his unpaid subscriptions.⁷ They hold he is also liable if the fund to which liability is limited is non-existent by his own fault.⁸

Interesting questions will arise in the administration of assets between creditors who are bound by contract to this limitation of liability and general creditors not bound by that stipulation. It has been held that holders of insurance policies containing such clauses were not partners, but should share equally with general creditors.⁹ It has also been held that the creditors who were limited to the nominal capital of the association had no equity of marshalling against general creditors who may hold the individual shareholders.¹⁰ A member who pays a debt of the association is entitled to contribution.¹¹

§ 32. Remedies of Creditors

A contract to pay out of specific funds does not create a charge on those funds,¹ but even before time of pay-

⁷ *Hallett v. Dowdell*, 18 Q. B. 2, 43, 55; *Merchant Traders' Ass'n*, 5 De G. & Sm. 386.

An action on an insurance policy containing such a limitation to recover the amount of a shareholder's unpaid subscription was held properly brought against the shareholder and not against the directors who executed the policy. *Reid v. Allan*, 4 Ex. 326.

⁸ *McIntyre v. Belcher*, 14 C. B. N. S. 654.

⁹ *English, etc. Assurance Society*, 1 H. & M. 85.

They have no charge on the assets giving them any priority over general creditors. *State Fire Ins. Co.*, 1 H. & M. 457.

¹⁰ *The Professional Life Assurance Co.*, L. R. 3 Eq. 668. See *State Fire Ins. Co.*, 34 L. J. Ch. 436.

¹¹ *Phillips v. Blatchford*, 137 Mass. 510; *Taber v. Breck*, 192 Mass. 355, 361, 365, 78 N. E. 472; *Comm. v. Rosen*, 176 Mass. 129, 130, 57 N. E. 223; *Engvall v. Buchie*, 73 Wash. 534, 132 Pac. 231. See § 24, note 16, and § 28, note 8.

¹ *Sovereign Life Assurance Co.* (1892), 3 Ch. 279; *Albert Life Assur-*

ment, the creditor may prevent the fund from being misapplied.² This does not amount, however, to an implied contract to continue to carry on the business.³ It will be practically impossible to sue at law on such contracts. The remedy will be in equity.⁴ The fact that the trust deed provides that the trustees shall be free from personal liability does not prevent them from contracting personally with a creditor of the association if they see fit.⁵

§ 33. Trustees of Associations for Profit

The relations between the trustees of associations for profit and the shareholders are determined by the rules ordinarily applicable to the relation of trustee and beneficiary. A shareholder may file a bill in equity against the trustee to compel performance of the trust.¹ But an assignee of all the shareholders and of the interest of one of the trustees cannot bring a writ of entry to

ance Co., 9 Eq. 706; *Industrial Co. v. Texas Ass'n*, 31 Tex. Civ. App. 375, 380, 72 S. W. 875.

² *Kearns v. Leaf*, 1 Hem. & M. 681; *State Fire Ins. Co.*, 1 De G. J. & Sm. 634.

³ *King v. Accumulative Co.*, 3 C. B. N. S. 151.

⁴ *Hallett v. Dowdell*, 18 Q. B. 2. See *Grain's Case*, 1 Ch. D. 315, 322.

⁵ A jury could find that the trustees authorized or ratified a borrowing by their agent on their personal credit. *American Co. v. Converse*, 175 Mass. 449, 451, 56 N. E. 594.

¹ *Mann v. Butler*, 2 Barb. Ch. 362, 367; *Chapin v. First Universalist Society*, 8 Gray 580, 583.

Shareholders in an unincorporated association to speculate in land, title to which was taken in name of defendant, bring bill for dissolution of the association, winding up and establishment of trust. Held: Statute of Limitations did not begin to run till after an open repudiation of the trust. *Barker v. White*, 58 N. Y. 204, 213.

A bill by beneficiaries of an association for an accounting against the trustee and manager was not multifarious. He occupied a fiduciary relation towards the complainants in both capacities and his breaches of trust relate to the same subject matter. *Moody v. Flagg*, 125 Fed. 819 (C. C. — Mass.).

recover possession of a building the association has erected.² A trustee cannot make a secret profit at the expense of the shareholders.³ Conference of all the

² Chapin *v.* First Universalist Society, 8 Gray 580, 583.

Land was conveyed to trustees for development to pay off a mortgage and then turn over to the directors of an association. The trust deed and articles of association were different instruments, but the latter was incorporated by reference in the former. Held: Directors of the association had no power to dedicate part of the land to the public without an act by the trustees. Ward *v.* Davis, 3 Sandf. 502, 514.

³ A blind pool syndicate for dealing in mining shares through a manager on money borrowed on guarantee of individual members. Plaintiff was member of pool and claimed secret profits because manager dealt with other syndicates in which he was interested and also bought and sold directly to the syndicate. Held: Latter improper, but the amount lost was less than what plaintiff owed the syndicate. The dealings with other syndicates were not beyond the scope of the authority of the manager having in view "the nature of the enterprise in which the appellant was concerned and the knowledge which must be imputed to him and his co-adventurers." Laughton *v.* Griffin (1895), A. C. 104, 112.

Syndicate was formed to speculate in a certain stock. It provided that the managers should not be interested in purchases individually. The subscribers were called on to take their shares. After plaintiff had taken his and settled with the managers, he brought this bill to reopen the whole settlement with self and associates, alleging that the managers had bought some of the stock for themselves and had made subscribers take it. Held: Plaintiff's right is against the managers alone and does not depend on the plaintiff's ignorance of the general partnership account. Plaintiff cannot reopen the settlement with his associates. Plaintiff may have action against the managers for damages for breach of contract. Strong dissent that must reopen whole accounting. Boody *v.* Drew, 2 Thomps. & C. (N. Y.) 69, 72.

One who organized a syndicate to speculate in land and held title as trustee and was also a shareholder must account for a secret profit made in turning over land to syndicate. Court put it on ground of agency, saying he was not exactly a trustee. Ferguson *v.* Bateman, 1 App. D. C. 279, 290.

Agent of land syndicate who held one share cannot make a secret profit out of the syndicate by selling them land he bought cheaper than their authorized price. Lyon *v.* Worcester, 49 Ill. App. 639, 650.

Minority shareholders in an association organized under a deed of trust may bring a bill for an accounting against the trustee who is alleged to have acquired shares which have been forfeited to the association making a majority and to have transferred the trust funds to a corporation which he controls. Booth *v.* Dodge, 69 N. Y. S. 673, 60 App. Div. 23.

A cooperative store association made an arrangement for a contribu-

trustees is not necessary to action. Being merely ministerial officers one might delegate his authority to the others.⁴ Even when it is expressly provided that a majority may decide, all must have notice or an opportunity to be heard.⁵ Notice to one trustee is notice to all and is not affected by the resignation of the original trustees and substitution of new ones.⁶ They are not liable for honest mistakes of judgment,⁷ but may be held responsible for negligence.⁸ It has been decided that when trustees were held on an accounting respon-

sion of capital by the son of its general manager for which a certificate for shares was issued. Later the manager mortgaged all the goods of the store to the son to secure this, claiming it had been a loan. Held: It was a contribution of capital and not a loan and there was no debt as consideration for the mortgage. Hence the manager must account for the goods in a suit by other shareholders (p. 622). Declared to be a partnership (p. 618). *Snyder v. Lindsey*, 157 N. Y. 616, 52 N. E. 592.

Promoters must make full disclosure to syndicate members. *Arnold v. Searing*, 78 N. J. Eq. 146, 78 Atl. 762. *Re John A. Fry*, 4 Phila. 129. But there is no objection if full disclosure is made. *McKinley v. Irvine*, 13 Ala. 681:

An unincorporated company with transferable shares to work a gold mine was organized by a declaration of trust by the owner. The trustee was asked by a shareholder to sell his share. He bought it himself with the knowledge and consent of the shareholder and paid assessment on it. Later a rich strike was made. Held: If sale was in good faith it was valid and trustee cannot be compelled to account for subsequent increase in value. *Swan v. Davenport*, 119 Ia. 46, 96 N. W. 65.

⁴ *Wells v. Gates*, 18 Barb. (N. Y.) 554, 556.

⁵ *Heard v. March*, 66 Mass. 580, 584.

⁶ And a purchaser of shares was not in the position of a purchaser for value without notice of a constructive trust in the lands included in the express trust when the trustees were chargeable with notice. *Bisbee v. MacKaye*, 215 Mass. 21, 25, 102 N. E. 327 (partnership real estate trust).

⁷ Directors of a banking association are not liable to stockholders for mistakes of judgment honestly made where they acted without compensation and exercised their best skill and judgment. *Addams's Appeal*, 15 W. N. Cas. 230 (Pa.).

⁸ Trustees of an unincorporated savings bank were held liable for negligence in entrusting its funds to a banking firm that had gone into the stock brokerage business and later became insolvent. For over two years they paid no attention to the business. *Holmes v. McDonald*, 226 Ill. 169, 80 N. E. 714.

sible for losses due to their negligence, they should bear it equally and not in proportion to their share holdings.⁹ Managers who are not shareholders are liable for the debts of the association only in case of exceeding authority or fraud.¹⁰ Trustees have no implied power to add to the capital of the association by borrowing money,¹¹ and for an obligation incurred personally for such a purpose they have no right of indemnity against the other shareholders.¹²

Some curious decisions in relation to such trustees seem inconsistent with elementary principles of trusts. It has been held that the remedy for negligence of syndicate managers of what appears to have been an association for profit in extending a loan was an action for breach of contract at law and not an accounting in equity.¹³ It has also been held that shareholders cannot bring a cross bill for exoneration against the di-

⁹ *Coit v. Tracy*, 9 Conn. 15, 21.

A defect in a chain of title was claimed to exist because it passed through certain trustees of land for a development association and the consent of the latter to the conveyance did not appear. Held: The trustees will be presumed to have been also members of the association and so beneficially interested. Hence the New York statute vesting title in the beneficiaries did not apply. Hence the trustees had authority to convey good title. *King v. Townshend*, 141 N. Y. 358, 364, 36 N. E. 513.

¹⁰ *Greenup v. Barbee's Exec.*, 1 Bibb. 320 (Ky.).

A bill for an accounting was brought by shareholders against the trustees to charge them for losses in managing a hotel alleged to be outside the scope of the purposes of the association. *Quimby v. Tapley*, 202 Mass. 601, 89 N. E. 167.

¹¹ *Burmester v. Norris*, 6 Ex. 796; *Ricketts v. Bennett*, 4 C. B. 688; *Hawtayne v. Bourne*, 7 M. & W. 595; *Hawken v. Bourne*, 8 M. & W. 703.

¹² *Re Worcester Company*, 3 De G. M. & G. 180; *Ex parte Chipendale*, 4 De G. M. & G. 43; *Australian Co. v. Mounsey*, 4 K. & J. 733. For cases on the right of indemnity of trustees, see § 43, notes 12 *et seq.*, § 44, note 23, and § 64, notes 2 and 3.

¹³ This case is perhaps explained on the theory that the members of the syndicate were independent contractors and not partners. The point was not discussed. *Paton v. Clark*, 156 Pa. 49, 53, 27 Atl. 116.

rectors, who were also defendants in the original suit, for negligence in incurring a debt on the ground that the relation of principal and surety did not exist between them.¹⁴ Where the trustees of an association converted its property they were held liable in tort at law.¹⁵

Since liability for torts is joint and several in equity as at law beneficiaries may bring a bill in equity for an accounting for wrongdoing by the trustees though all are not within the jurisdiction, but if the purpose is to enjoin contemplated action by some of the trustees looking to the dissolution or winding up of the association, it is necessary that all trustees be within the jurisdiction and be made parties, otherwise there might be conflicting decisions in different jurisdictions as to the action contemplated.¹⁶ The provisions for selection of new trustees to fill vacancies must be strictly complied with. Thus where the deed of trust, empowering the remaining trustees to appoint the new trustee, provided that they express their choice by executing a formal certificate to that effect, a mere vote without such a certificate was held not to entitle the person elected to bring a bill for an injunction against the remaining trustees to certify their selection.¹⁷ Trustees have power to issue shares as provided in the deed of trust even after the land which was the original capital of the enterprise has been sold.¹⁸

¹⁴ *Manning v. Gasharie*, 27 Ind. 399.

¹⁵ "When trustees commit any act not inseparable from their liabilities as such they are amenable like other individuals in an action of tort." *Dennis v. Kennedy*, 19 Barb. 517, 526.

¹⁶ *American Cotton Oil Trust. Wall v. Thomas*, 41 Fed. 620 (C. C. — N. Y.).

¹⁷ *McFaddin v. Wiess*, 168 S. W. 486, 490 (Tex.).

¹⁸ *Yeaman v. Galveston City Co.*, 167 S. W. 710, 720 (Tex.)

**§ 34. Propriety of Investment by Trustees in Shares in
Associations for Profit**

A question has been raised as to the propriety of investments by trustees in securities of unincorporated associations. In the case of *Smith v. Smith* the Massachusetts Supreme Court held that shares in the Massachusetts Electric Companies, an unincorporated association holding bonds and stocks of street railways of eastern Massachusetts outside of Boston, was an improper investment for trustees.¹ If these associations are partnerships the ground for the decision is obvious. The danger to partners does not arise during comfortable business times. It comes with financial failures due usually to the carelessness or dishonesty of representatives. The distinguished gentlemen now acting as trustees doubtless may safely be trusted even to delegate wisely their authority necessarily involved in the management of these large interests. But can the shareholders be sure that their successors in the trust will be equally trustworthy? As yet these trusts are held by individuals and not by trust companies, just as the early railroad trust mortgages were held by individual financiers. It may be that this business will be transferred ultimately to the trust companies, although

¹ After the opinion in this case was handed down and printed in an unofficial publication called the *Banker & Tradesman*, of June 27, 1908, counsel called the attention of the court to an error in the proceedings below which it was claimed should have deprived the court of jurisdiction. The opinion was thereupon withdrawn and the case recommitted to the lower court, where it was immediately settled. The case was not decided on the ground that it was a partnership. Indeed, it may still be that the court will follow *Smith v. Anderson*, *supra*, as to these holding trusts. In a later decision the court said, "the propriety of the investment of trust funds in securities of this character is not presented by the amended record and this question is postponed for decision until it properly arises." *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171.

they are now hardly equipped to manage directly industrial enterprises. The risks to shareholders are even more obvious in the trusts whose assets consist of stocks and bonds of public service corporations on which other bonds are often issued. The assurance of a trust estate sufficient to meet obligations is less likely than in the case of real estate. It seems likely, however, that the law as to liabilities of shareholders in these organizations will soon be settled by decisions and it is to be hoped that the courts will take a broad view of the questions so that securities issued by unincorporated associations will be able to compete with those of corporations. If the organization which issued the shares is not a partnership but a trust, there can be no impropriety in the purchase of them by trustees.

§ 35. Governmental Control over Associations for Profit

The cause of the recent development of these associations is doubtless the desire to escape troublesome statutes regulating corporations which interfere with plans for combination and stock watering, the unpleasant certainty of taxation and the publicity of returns. Is there any immunity from regulation in these associations which derive no franchise from the State?

It was originally supposed that *Eliot v. Freeman*¹ decided that real estate trusts could not constitutionally be taxed, but the court simply said that the original Federal Corporation Tax as written did not include them. It is to be noted, however, that the justification of the constitutionality of the Federal Corporation Tax was put on the ground that it was a tax on a

¹ 220 U. S. 178, 197, 55 L. ed. 424, 31 S. Ct. 360.

privilege conferred by the State or Federal Government, and the real estate trusts were said to have no such privilege.

The amendment to the Interstate Commerce Act authorizing regulation of rates provided that "the term common carrier as used in this act shall include express companies." It was held by the United States Supreme Court that this included the great express companies though they are partnerships. Judge Holmes said: "The power of Congress is hardly denied. The constitutionality of the statute as against corporations is established and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability and to personify the company so far as to collect a fine by a proceeding against it in the company name." The court, however, refers to the New York cases to show the "semi-corporate standing of these companies."²

Except for the filing statute above noted, Massachusetts has not yet attempted to regulate these associations. The English Companies Act now provides that the number of an unincorporated partnership shall not exceed twenty numbers.³

The Federal Income Tax of 1913 expressly includes associations with corporations as subject to the tax. It also makes special provision for taxing partnerships. It seems likely, therefore, that the next important decision on the nature of these associations will occur in litigation arising under this statute.

There has been no decision directly passing upon the right to regulate unincorporated associations as dis-

² *United States v. Adams Express Co.*, 229 U. S. 381, 390, 57 L. ed. 1237, 33 S. Ct. 878.

³ 8 Edw. VII, c. 69, § 1.

tinguished from all other partnerships. Regulations discriminating between corporations on the one hand and unincorporated associations and individuals on the other raise a somewhat similar problem but one much easier of solution, since corporations having a franchise from the State are clearly subject to regulation. The principle involved in the two cases must be the same, however, though its application will be different. When the restrictions placed upon corporations are less than those upon associations or individuals, that is, when the design is to restrict a business to corporations, the analogy becomes closer. Of such a case Judge McLain said: "The question is as to the right to discriminate between classes by way of regulation of the business," (unincorporated associations, partnerships and individuals on the one hand and corporations on the other). "That such discrimination may be made when based on a reasonable distinction involving the public welfare cannot be questioned; and if the distinction between classes is reasonable and not purely artificial and the statute is applicable to all who come within the limits of the classification, its constitutionality cannot be questioned."⁴ It has been held that shares in such associations cannot be taxed to the owner.⁵ But that the association, like other partnerships, must be assessed in the town of its principal place of business.⁶ The distinction made between shares in corporations and shares in associations was that whereas the former were property under Massachusetts

⁴ Restrictions on unincorporated building and loan associations greater than those on corporations held constitutional. *Brady v. Mattern*, 125 Ia. 158, 163, 100 N. W. 358.

⁵ *Hoadley v. County Commissioners*, 105 Mass. 519, 526.

⁶ *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, 349, 5 N. E. 284; *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808.

decisions, the latter simply represented an undivided partnership interest in the net assets of the association which was otherwise taxed.⁷

On the other hand, it has been held recently that shares in real estate trusts are not choses in action but a substantial property right and are subject to the succession tax like shares in domestic corporations.⁸

It has been held that the Massachusetts corporate franchise tax, an excise on the corporation based on the excess in market value of its aggregate share capital over the assessed value of its tangible property otherwise taxed, cannot be extended to associations.⁹ The reasons given were that the association did not ask any special privilege of the legislature and that its peculiar features were created by agreement of the members under their natural rights at common law. "We do not see how this peculiar feature (transferability of shares) can be called a commodity, subject to special excise, any more than the agreement of co-partnership itself or any clause or part of it or any other agreement, right or mode of transacting any business can be called a commodity and so liable to taxation at the will of the legislature." The true meaning of this decision has been the subject of discussion in subsequent decisions.¹⁰

⁷ *Hoadley v. County Commissioners*, 105 Mass. 519, 526.

⁸ *Peabody v. Treasurer*, 215 Mass. 129, 102 N. E. 435. See § 21.

Shares in a joint stock association of New York owned by a deceased resident in New York are personal property and taxed at full value though part of the assets of the association was real estate, which if it had descended to the heirs of the deceased would have been exempt. *Re Jones*, 172 N. Y. 575, 65 N. E. 570.

Shares in a New York joint stock association owned by a resident of New Jersey are liable to a transfer tax on his decease on the proportion of their value which the property within the State bore to the entire property of the association. *Re Willmer's Estate*, 138 N. Y. S. 649, 153 App. Div. 804.

⁹ *Gleason v. McKay*, 134 Mass. 419, 425.

¹⁰ See *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512.

Not long since the legislature of Massachusetts exercised its constitutional right and asked the opinion of the justices on the constitutionality of a stock transfer tax including a tax on shares in unincorporated associations. The judges differed in opinion, a majority holding such a tax valid — three on the ground that an excise in Massachusetts can be levied on a privilege which is the exercise of a natural right. Four judges denied this, and three held that transferability of shares in a partnership is an immaterial distinction from other partnerships and cannot be a basis for classification, but one (now the Chief Justice) held that transferability of such shares was not a natural right because a business dependent on such elaborate provisions which require constant resort to the courts for their enforcement may be regulated by the legislature, but he did think that an excise on the existence of such an association or on the holding of property by it would be unconstitutional. It is not entirely clear whether or not the justices thought that doing business in the form of a partnership is taxable provided that the excise applies to all partnerships.¹¹ The legislature of Massachusetts, however, in enacting the stock transfer tax of 1914 included a section making it applicable to transfers of shares in voluntary associations organized under a written instrument or declaration of trust the beneficial interest in which is divided into transferable shares.¹² An authoritative decision of the court on the constitutionality of this section of the law will doubtless soon be rendered.

¹¹ Opinion of the Justices, 196 Mass. 601, 615, 620, 626, 85 N. E. 545.

¹² Acts of 1914, ch. 770, § 10, as amended by Acts of 1915, ch. 238, § 5.

§ 36. The Uniform Partnership Act

No discussion of the subject of this chapter would be complete without consideration of the effect on it of the codification of the law of partnership which was adopted in 1914 by the Conference of Commissioners on Uniform State Laws. This Code will doubtless be enacted into law in some of the States before this book goes to press. It makes some changes in the law of partnership and makes certain many things that were before in confusion. As the result of twelve years' discussion among the Commissioners and their expert advisers it is doubtless the best practical solution of a perplexing problem and without regard to its fundamental soundness ¹ will be welcomed for its promise of defi-

¹ In no department of the law has controversy been keener than between the advocates of the so-called "entity theory" of partnership and the advocates of the so-called "common law" theory. The supporters of the latter have regarded themselves as paladins of a cherished principle handed down from a golden age of the common law pure and undefiled and have affixed that worst stigma of the practitioner, "theorist," to those who sought to make consistently visible throughout the framework of the subject the basic logic which the instinct of merchants has always applied to the practical aspects of this purely mercantile relation. When the commissioners began consideration of this subject the late Dean Ames was employed to draw an act in accordance with the mercantile conception of partnership of which he had been one of the greatest advocates. Later, however, the defenders of the faith rallied their forces and gradually brought the Conference to adopt formally the other theory. Attempts to make such a code logically consistent then resulted in several drafts which have culminated in one which is in itself a conclusive confirmation of the soundness of the mercantile view. It has often been noted that those jurisdictions that were loudest in their approval of the "common law" theory of partnership were the first to depart from it in reality when wrestling with specific problems. The proposed code, while asserting with emphasis the favorite rule of the supporters of the common law theory, viz., that the partners as individuals have a property right in the specific property of the partnership, creates for that property right a new name, — tenancy in partnership — and then proceeds by definition to eliminate from it all essential incidents of property rights, leaving in it only a modified right to possession. The other important changes in the

nite rules instead of conflicting opinions. The Code defines partnership as "an association of two or more persons to carry on as co-owners a business for profit."² It makes no distinction between small partnerships and large associations. On some points already discussed in this chapter it makes certain the rule towards which the courts seemed tending, but in the main it will effect few changes in the law applicable to what are herein called unincorporated associations. Since the problems involved in the modern associations formed under elaborate deeds of trust arise mainly from express agreement of the parties defining their relations, the Code will have no effect on them except where the plans of their organizers break down.

One of the most important parts of the new Code is that dealing with real property. Title to firm real estate may be acquired and conveyed in the partnership name.³ A conveyance in the firm name by any partner passes the title in such real estate to the grantee, but the firm may recover it, if the partner's act does not "bind the partnership," unless the land has passed to a "holder for value without knowledge that the partner in making the conveyance has exceeded his authority."⁴ "Knowledge" is defined to include "knowledge of such facts as in the circumstances shows bad faith."⁵ Where title to real property is in the name of the partnership; a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the

law which this code will produce all tend towards consistency with the mercantile view of partnership. If the act had emanated from a legislative committee should we suspect that the radicals had, in the language of the day, "put one over on" the conservatives?

² Section 6 of the Act.

³ Section 8 (3).

⁴ Section 10 (1).

⁵ Section 3 (1).

authority of the partner "as previously defined.⁶ Where title to real property is in the name of one or more but not all the partners and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership" as previously defined "unless the purchaser or his assignee is a holder for value without knowledge."⁷ "Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner" as previously defined.⁸ "Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property."⁹ All of these provisions are simply the application of common sense to a business problem. So far as they change existing law they are wholly desirable.

The next important change in the present law relates to changes in the membership of the firm. "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred except that this liability shall be satisfied only out of partnership property."¹⁰ "A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership."¹¹ "The dissolution of a partnership is the

⁶ Section 10 (2)

⁷ Section 10 (3).

⁸ Section 10 (4).

⁹ Section 10 (5).

¹⁰ Section 17.

¹¹ Section 27 (1).

change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.”¹² “On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.”¹³

The effect of dissolution on existing liabilities of the firm is left unchanged by the Code.¹⁴

The rights of creditors upon a change in the membership of a firm without a liquidation are further treated in an elaborate series of rules,¹⁵ which, without changing the rule that change of membership is a dissolution, in substance provide that creditors of the firm as it was before the change in membership are creditors of the firm that exists thereafter (the new partners' liability to be satisfied only out of the partnership property) and thereby establish their right to reach the property employed in the business. Under these rules a shareholder in a partnership association who sells his share does not thereby escape liability for debts contracted during his membership unless the courts find from the nature of the organization that the creditor impliedly agreed to accept his transferee as debtor in place of the transferor by way of novation; in the absence of such agreement the transferee is not personally liable for debts incurred before the transfer, but creditors may reach directly the property of the association whether their claims accrued before or after the transfer of shares in question; and transfer of shares effects a technical dissolution of the partnership. It is to be expected, however, that courts which have shown a tendency to classify associations as something

¹² Section 29.

¹⁴ Section 36.

¹³ Section 30.

¹⁵ Section 41.

distinct from other partnerships, will hold ultimately that the nature of these organizations is so familiar and the understanding of business men that their obligations are to be enforced only against the association as it exists at the time of enforcement so common that a novation is implied in every case of transfer of shares.

The creation by the act of a new property right to be known as tenancy "in partnership" is the only change in the law as now generally accepted regarding the nature of a partner's interest in the property of the firm. While this as previously explained is apparently a mere change in nomenclature, it will probably overrule some decisions that have been much criticised,¹⁶ which, however, are not of especial concern in the kind of partnership discussed in this chapter.

¹⁶ If the partner is to have theoretically a property right in the property of the firm in addition to his right to an accounting and payment of his share in the net assets (which in the Code is described as his interest in the partnership as distinguished from his interest in specific partnership property) it is difficult to see how his right to share in assets unexpectedly realized upon by one partner after dissolution would be barred by the statute of limitations which bars enforcement of the right to an accounting as in *Knox v. Gye*, L. R. 5 H. L. C. 656. This is borne out by § 30, which provides that on dissolution a partnership continues "until the winding up of partnership affairs is completed."

CHAPTER III

TRUSTS

§ 37. In General

TRUSTS for large numbers of beneficiaries whose interests may or may not be represented by transferable certificates are but a natural outgrowth of simple express trusts and the rules of law applicable to them are those which have been established with reference to all other trusts. The possibilities of the instruments creating such trusts are infinite, because so far there has been little attempt by legislatures to regulate or restrict them. The possibility that it may be held that the rule against perpetuities or the rule against restraints upon alienation apply to trusts of the character here considered has been fully discussed and it is usual to avoid this possibility by appropriate limitation upon the duration of the trust.¹ The forms of trust deeds are, therefore, various and the construction placed upon one is not always helpful in determining the true meaning of another.² The ones

¹ *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246; *Howe v. Morse*, 174 Mass. 491, 503, 55 N. E. 213 (these were trusts for associations for profit, but the same principle must apply to pure trusts). Gray, *Perpetuities*, 3d ed., § 509. See § 11.

² A trust deed was acknowledged, delivered and accepted by the trustees in New York where the grantor then resided. The trust estate was stock in corporations organized in four different States. No place of performance was designated. Held: The instrument is to be construed by the law of New York without reference to the residence of the trustees or the later residence of the grantor. *Mercer v. Buchanan*, 132 Fed. 501 (C. C. — Pa.).

A holding trust deed was interpreted to confer on the trustees the

more commonly used in modern business, however, fall into a few well-recognized classes, each having certain characteristics.

There are still other business relations which should properly be classified as trusts, but which have not yet been so defined by the courts. The relation between underwriters of securities and the managers of the syndicate, for example, has usually been deemed that of principal and agent. In underwriting agreements as formerly drawn this was probably the correct conclusion and the cases are therefore considered with other "unassociated groups" in Chapter IV.³ The members of these syndicates, however, do not contemplate incurring the liability of a principal for acts of their managers, nor do they need to exercise the control over their managers that a principal has over his agent. In the more recent underwriting agreements the transaction really takes the form of a trust in which the manager holds the funds, or rather the obligations of the subscribers to furnish funds, as trustee for them and contracts for their benefit, but as a principal holding legal title and not as an agent.⁴

There have been occasional instances in the reports of trusts under wills empowering the trustee to continue the testator's share in a partnership for the benefit of certain beneficiaries. These cases are cited as authorities in cases involving the more formal trusts for numerous beneficiaries.⁵

power to sell stock as well as buy it. Not accountable if act in good faith. *Gould v. Head*, 41 Fed. 240 (C. C. — Col.).

³ See §§ 8 and 50.

⁴ *Jones v. Gould*, 209 N. Y. 419, 424, 426, 103 N. E. 720. See § 53, note 3.

⁵ *Burwell v. Mandeville's Exce.*, 2 How. 560; *Ex parte Garland*, 19 Ves. 110; *Ex parte Richardson*, 3 Mad. Ch. 79; *Re Johnson*, 15 Ch. D. 548.

The distinction between partnership associations and pure trusts has already been discussed at length.⁶ It is sufficient here to say that the essential elements of a partnership which are lacking in pure trusts are the element of association and the right on the part of the beneficiaries to direct and control the management of the funds by the trustees. The cases involving trusts organized for the purpose of conducting a business or for the purpose of holding securities or property as an investment for numerous beneficiaries whose interests are represented by transferable shares, so far as they relate to the nature of the organization are not repeated here.

§ 38. Trusts for Creditors

An instance of trusts of this sort is that created by an assignment for the benefit of creditors. It frequently happens that the assignees are empowered to run a business and apply its profits to the liquidation of the claims of creditors. Even where the deed of assignment purports to give the assignee this power to continue the business he should, for his own protection, obtain the consent of creditors¹ or he may be held personally liable for losses. Such assent may be found from execution of a deed of assignment containing such a provision. In some cases the agreement for this purpose which is signed by the creditors creates what is really a partnership,² but in most instances it will be found that the

⁶ See § 9.

¹ *Hill v. Cornwall*, 95 Ky. 526; *Cooper v. Lankford*, 117 Ky. 792, 78 S. W. 197; *Wilhelm v. Byles*, 60 Mich. 561, 567, 27 N. W. 847; *Quimby v. Uhl*, 130 Mich. 198, 211, 89 N. W. 722; *Brown's Estate*, 193 Pa. St. 281, 44 Atl. 443.

² Creditors of an insolvent business had it transferred to trustees who carried it on for their benefit to pay off their claims and then turn it over

creditors are simply beneficiaries acting as individuals and not really as a group or association. "The profits which the trustee applies to their claims are the debtors' profits, not theirs. They are not the proprietors of the business. They have not the right to direct and control the acts of the trustee as a principal would an agent. The trust is really created as security for their claims."³

39. Car Trusts

Another form of trust with transferable shares familiar to investors is the so-called "Car Trust." This is a method of financing the purchase of rolling stock of a railroad by giving a first lien on the rolling stock when purchased and thus preventing it from coming under the lien of the general railroad mortgages. They have usually been organized so as to be held to be not partnerships.¹

to the original owners. The net income which was to be distributed was always to be regarded as the property of the old firm. A majority of the creditors could make rules for the conduct of the business and decide to discontinue it. An action was brought on bills of exchange accepted by an agent of the trustees against certain creditors who had signed the indenture of trust. Held: Not a partnership because no mutual agency of the certificate holders. *Cox v. Hickman*, 8 H. L. C. 268. The definition of partnership announced in this case (known as the mutual agency test) has been generally repudiated.

³ *Smith v. Williams*, 178 Ill. 420, 53 N. E. 358; *Sterns Co. v. Williams*, 178 Ill. 626, 53 N. E. 361; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 465, 75 N. W. 911; *Re Stanton Iron Co.*, 21 Beav. 164.

¹ Railroad directors and promoters formed car trusts. There was a trustee who issued certificates in each trust to the subscribers. Brown, J., said, "The car trust associations were not corporations or partnerships nor legal entities of any description, but were simply car trust certificates in the hands of various persons who were represented by the petitioner, McGourkey." Held on peculiar facts of case that the purchases were really made by the corporation and not by the car trusts, and the rolling stock came under the general mortgage. *McGourkey v. Toledo Co.*, 146 U. S. 536, 557, 36 L. ed. 1079, 13 S. Ct. 170.

Trustees of a car trust signed a second lease with the railroad reducing the rate of interest. They signed as trustees but expressly said they executed only on behalf of such certificate holders as should consent,

§ 40. Trusts for Bondholders

Trusts under mortgages executed by corporations to secure issues of bonds are, in some aspects, examples of the sort of trust under consideration. Ordinarily the functions of the trustee are purely formal and the real business relation exists between the mortgagor corporation and the bondholders as creditors. With this relation we have no concern.¹ In the relation of the trustee to the bondholders will be found sometimes illustrations of the law applicable to trusts conducting business enterprises.² When such a trustee gets absolute title by entry and possession for the statutory period, he may execute the trust by liquidating and dividing the net proceeds among the bondholders.³ In one case he was held justified in leasing the road in-

etc. Some did not consent and the trustees sued on the old lease for the higher rate for them, the lower rate having been paid the others. Held: No inconsistency in allowing recovery on the old lease in this way. It does not matter what authority the trustees had to bind the minority when they did not purport to exercise it. "In our view whether the car trust is a partnership or a joint stock association or a *quasi*-corporation is not of the least importance." *Humphrey v. N. Y., etc. R. R. Co.*, 121 N. Y. 435, 447, 24 N. E. 695.

Where the trust deed provided for a real association, it was held to be a partnership. *Ricker v. American L. & T. Co.*, 140 Mass. 346, 5 N. E. 284.

¹ In this treatise we are not concerned with the mutual obligations between the trustees and the corporation or between individual bondholders and the corporation. For a full discussion of the subject see Jones on Corporate Mortgages and Bonds.

² When the trustee is to certify bonds and superintend the sale of them and the application of the proceeds and to do other things involving discretion, it constitutes the transaction of business and when done in a State by a foreign corporation subjects it to regulation as such. *Farmer's Co. v. Lake Street Ry. Co.*, 173 Ill. 439, 51 N. E. 55.

A by-law authorizing bondholders to vote for directors was held invalid as contrary to the statutes providing for vote by stockholders. The interests of stockholders and bondholders are diverse. *Durkee v. People*, 155 Ill. 354, 40 N. E. 626.

³ *Haven v. Grand Junction Co.*, 12 Allen 337.

stead of liquidating.⁴ It sometimes happens that upon a foreclosure the trustee is obliged to take possession and operate the business for a time, though he usually does this through a receiver appointed by the court.

§ 41. Voting Trusts

Voting trusts of stock in corporations are a form of trust in which the beneficial interest is frequently represented by transferable certificates similar to the certificates of stock which have been deposited by the shareholders with the voting trustee and for which they are substitutes. The trust is an active one because the trustee through his voting power controls the policy of the corporation and the trust is usually formed to insure a consistent policy on the part of the corporation for a certain period for the benefit of its other security holders. The duties of the trustee, however, are more limited than in most of the other forms of trust under consideration. A voting trust is legal from the standpoint of the law of corporations if the holders of all the shares have an equal privilege (after fair information) of availing themselves of the trust agreement if they shall so choose and if the object of the trust is the equal benefit of all shares.¹

§ 42. Combinations

The original Standard Oil Trust, which was held in Ohio to be a partnership,¹ was held in New York not a

⁴ *Sturges v. Knapp*, 31 Vt. 1.

¹ *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773. Such agreements were upheld in *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809; *Lord v. Equitable Soc.*, 194 N. Y. 212, 238, 87 N. E. 443; *Boyer v. Nesbitt*, 227 Pa. St. 398, 76 Atl. 103.

¹ *State v. Standard Oil Co.*, 49 Ohio St. 137, 176, 30 N. E. 279.

partnership but a trust.² It was a highly organized association with transferable shares and on a bill in equity to compel a transfer of shares on the books of the trustees, which was defended on the ground that the transferee was a rival oil producer and did not seek membership in good faith, the court held that the trustees had no more discretion than a corporation and compelled the transfer.³ It would seem that the desire of the court to enforce the transfer and to avoid a supposed obstacle in the familiar rule of *delectus personae* applicable to ordinary partnerships, led it into the declaration that this association was not a partnership.

§ 43. Rights of Creditors¹

The important question in regard to all these forms of organization is as to the rights of creditors in the collection of their claim. In the absence of some stipulation in the contract to the contrary, it is well settled that one who contracts with a trustee has a contract right at law against the trustee personally, since courts of law purport to ignore the existence of trusts and the trustee does not act as agent for his beneficiaries but is himself the principal.² An action at law against the

² *Rice v. Rockefeller*, 134 N. Y. 174, 179, 31 N. E. 907.

³ *Ibid.*

¹ See §§ 32 and 33.

² *Taylor v. Davis*, 110 U. S. 330, 334, 28 L. ed. 163, 4 S. Ct. 147; *American, etc. Co. v. Converse*, 175 Mass. 449, 56 N. E. 594; *Roger Williams Bank v. Groton Co.*, 16 R. I. 504, 17 Atl. 170; *Ex parte Garland*, 10 Ves. 110, 118 (trustee carrying on business under directions in will); *Cutbush v. Cutbush*, 1 Beavan 184 (ditto); *Lucas v. Williams*, 4 D. F. & J. 438 (ditto); *Fenwick v. Laycock*, 2 Q. B. 108 (ditto); *Re Evans*, 34 Ch. D. 597, 600 (ditto).

In actions on notes of trustees, it has been held that the addition of the word "trustee" to the name of the maker was merely *descriptio personae*. *Comes v. Clark*, 12 Cal. 168; *Fiske v. Eldridge*, 12 Gray 474; *New v. Nicholl*, 73 N. Y. 127.

trustees of a real estate trust was brought by a creditor and an attachment of real estate of the trust was attempted. Later the trust became insolvent and was placed in the hands of a receiver. The attaching creditor sought by petition to have his claim allowed in priority. This was refused on the ground that on no theory had a valid attachment been made. The court said: "The trustees held the legal title to all the property and they alone could make contracts. Ordinarily, in the absence of special limitations, trustees bind themselves personally by their contracts with third persons. Actions at law upon such contracts must be brought against them and judgments run against them personally. This is because the relations of the *cestuis que trust* to their contracts are only equitable and do not subject them to proceedings in a court of common law and the property held in trust is charged with equities which hold it aloof from the jurisdiction of a court of law to take it and apply it in payment of debts created by the trustees. Such debts, if proper charges upon the trust estate can be paid from it under the authority of a court of equity. . . . If the trustees contracted in the usual way without referring to anything which would limit the liability resulting from an ordinary contract, they are personally liable to these petitioners and judgment can be obtained and enforced against them individually; but the trust property cannot be held under an attachment nor sold upon an execution for their personal debts." ³

The trustee may also be held personally liable for torts committed in the execution of the trust by himself

³ *Hussey v. Arnold*, 185 Mass. 202, 204, 70 N. E. 87.

or his agents.⁴ The liability of trustees, in cases where there are more than one, has been held to be joint and several.⁵ Stipulations in contracts by trustees exempting the trustee from personal liability have been held effective.⁶ A covenant by trustees "as such trustees but not otherwise" to repay a loan is merely a covenant to repay the money out of any trust funds coming into their hands and does not impose any personal liability upon them.⁷ It is equally well settled that one who contracts with a trustee has no right of action against the beneficiaries personally.⁸ The decisions have been less clear as to the right of the creditor to reach the funds of the trust. It is plain that in order to recover the creditor must show that "the obligation was incurred by the trustees in the course of their duty in administering the trust out of which satisfaction is sought."⁹ At

⁴ Negligence of servants. *Parmenter v. Barstow*, 22 R. I. 245, 47 Atl. 365; see *Fallardeau v. Boston Ass'n*, 182 Mass. 405, 65 N. E. 797; *Curry v. Dorr*, 210 Mass. 430, 97 N. E. 87.

A trustee under a mortgage securing bonds while in possession and operating the business is liable for negligence like any other employer. *Ballou v. Farnum*, 9 Allen 47; *Daniels v. Hart*, 118 Mass. 543; *Stratton v. European R. R.*, 76 Me. 269; *Wright v. Railroad*, 151 N. C. 529, 535, 66 S. E. 588.

⁵ So that one whose right of indemnity might be barred could be omitted. *Re Frith*, (1902) 1 Ch. D. 342.

⁶ *Glenn v. Allison*, 58 Md. 527; *Shoe, etc. Bank v. Dix*, 123 Mass. 148; *Mitchell v. Whitlock*, 121 N. C. 166, 28 S. E. 292. See *Hussey v. Arnold*, 185 Mass. 202, 204, 70 N. E. 87; see §§ 29 to 31, inclusive.

In *Glenn v. Allison*, *supra*, the agreement was implied from reference in a mortgage to the deed of trust which provided that the trustee should not be personally liable.

⁷ *Re Robinson's Settlement*, (1912) 1 Ch. 717.

⁸ *Everett v. Drew*, 129 Mass. 150.

Transferable scrip issued to finance an invention. *Mayo v. Moritz*, 151 Mass. 481, 484, 24 N. E. 1083.

⁹ A by-law of the Buena Vista Fruit Company, an association organized under a deed of trust, provided "that the treasurer shall 'make, sign, endorse and accept for and in the name and behalf of the company promissory notes, drafts and checks in the regular course of its business.' The note in suit was made in accordance with this by-law. It is not signed by the trustees, but by the treasurer of the association in its

law it would seem that the creditor has no right to attach the trust fund,¹⁰ but there seems no reason why such right should not be given by proper proceedings in equity.¹¹ The trustee has a right of exoneration out of

name. Article 11 of the declaration of trust provides that 'all contracts and engagements entered into by the trustees, and all conveyances and instruments executed by the trustees, shall be in the respective names of the trustees and shall provide against any personal liability on their part, and stipulate that no other property shall be answerable than the property in the hands of the trustees.' Plainly the note in suit is not the obligation of the trustees executed in accordance with the power thus conferred, but the note of the company executed by its agent pursuant to its by-laws. Neither in fact nor in legal contemplation is it the note of the trustees. It follows that the plaintiff has not brought his case within the principle of law on which his bill is framed and on which he recovered in the Superior Court, viz., that when a trustee has incurred an obligation in conducting the trust, the person to whom that obligation is due can satisfy it out of the trust estate. Hence the decree in favor of the plaintiff was wrong, founded as it was upon that principle of law." *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009. See § 14, note 11.

¹⁰ *Pillgrem v. Pillgrem*, 18 Ch. D. 93 (trustee under will carrying on business in own name). See *Farhall v. Farhall*, 7 Ch. 123.

In a few cases the trust estate has been reached in an action at law.

In an action of tort for negligence in a court having both law and equity jurisdiction, one of the defendants was a trustee operating a railroad for the benefit of creditors and he was held liable in his official capacity and the trust estate subjected to payment. The court said also that he might have been held liable personally. *Wright v. Railroad*, 151 N. C. 529, 535, 66 S. E. 588.

Defendants were sued as trustees in tort for negligence. Under the deed of trust they "were empowered to deal with the property as if they were absolute owners thereof. It is also provided that no responsibility whatever shall result to them by reason of misconduct of agents or employees and also 'for negligence there shall be no liability or responsibility' upon the part of the trustees." Held: "It was clearly intended that the risk of any loss in this respect should be assumed and borne by the estate." A judgment against the trustees as such was affirmed. *Prinz v. Lucas*, 210 Pa. St. 620, 60 Atl. 309.

¹¹ *Mason v. Pomeroy*, 151 Mass. 164, 167, 169, 24 N. E. 202 (trustees carrying on a factory under terms of a will); *Woddrop v. Weed*, 154 Pa. St. 307, 26 Atl. 375 (trustee carrying on under a will a business which became insolvent).

"The general rule undoubtedly is that a trustee cannot charge the trust estate by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable and the remedy is against him personally. But there are exceptions to this general rule. When a trustee is authorized to make an expenditure and he has no trust funds and the expenditure is

the trust fund for any liabilities he has properly incurred personally in the management of the trust estate.¹² It is entirely consistent with the usual principles of equity jurisdiction to give the creditor a right to avail himself of the trustee's right against the trust fund, and there are decisions to this effect.¹³ In the absence of agreement, however, there would be no reason for holding that such a creditor had any lien upon the trust fund.¹⁴ If the trustee is absent from the State or is insolvent (and these are the only cases in which it will be important for the creditor to have this right), the creditor should be allowed to proceed against the trust estate without joining the trustee.¹⁵ The creditor's right would, of course, be limited to the extent of the trustee's right in any given case and if any equity exists against the trustee in favor of the trust estate with respect to the particular right of exoneration in question, the creditor must be equally restricted.¹⁶ In some

necessary for the protection, reparation or safety of the trust estate, and he is not willing to make himself personally liable, he may by express agreement make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure and he would have a lien upon the trust estate, and he can by express contract transfer this lien to any other party who may upon the faith of the trust estate make the expenditure." Trust under a will. *New v. Nicholl*, 73 N. Y. 127, 131.

¹² *Hardoon v. Belilios*, (1901) A. C. 118, 124; *Bennett v. Wyndham*, 4 De Gex. F. & J. 259 (tort).

¹³ *Mason v. Pomeroy*, 151 Mass. 164, 167, 169, 24 N. E. 202; *Dowse v. Gorton*, 40 Ch. D. 536; *Ex parte Edmunds*, 4 De G. F. & J. 488; *Re Raybould*, (1900) 1 Ch. 199 (judgment creditor in action of tort); *Moore v. McGlynn*, (1904) 1 Ir. R. 334.

¹⁴ *Hewitt v. Phelps*, 105 U. S. 393, 26 L. ed. 1072; *New v. Nicholl*, 73 N. Y. 127.

¹⁵ *Norton v. Phelps*, 54 Miss. 467. See *Hewitt v. Phelps*, 105 U. S. 353, 400, 26 L. ed. 1072, where the same case came up on diverse citizenship. The Norton case was cited as settling the Mississippi law.

¹⁶ *Broadway National Bank v. Wood*, 165 Mass. 312, 316, 43 N. E. 100; *Dunham v. Blood*, 207 Mass. 512, 514, 93 N. E. 804; *King v. Stowell*, 211 Mass. 246, 98 N. E. 91; *Strickland v. Symons*, 22 Ch. D. 666, 26 Ch. D. 245; *Re Evans*, 34 Ch. D. 597; *Re Johnson*, 15 Ch. D.

States, however, the creditor has been allowed to reach the trust fund regardless of the state of the accounts between him and the estate.¹⁷ The beneficiaries are not necessary parties defendant in actions on contracts or torts of the trustees, when the trust instrument makes him their representative, even though the purpose of the suit is to reach the trust fund.¹⁸ A court of equity will set aside preferences given by a trustee out of the trust estate after it is insolvent and distribute it equally to all creditors.¹⁹

§ 44. Mutual Obligations of Trustee and Beneficiary¹

The obligation of good faith on the part of the trustee towards the beneficiary is the origin of the whole law of fiduciaries which has come to play so important a part in the adjustment of our complicated modern relations. He cannot make a secret profit at the expense of his beneficiary.² Acting in good faith, a trustee for bondholders was held justified in bidding in the mort-

548; *Dowse v. Gorton*, (1891) A. C. 190; *Re Raybould*, (1900) 1 Ch. 199; *Newton v. Ralfe*, (1902) 1 Ch. 342, 345; *Boylan v. Fay*, 8 L. R. Ir. 374; *Re Morris*, 23 L. R. Ir. 333.

¹⁷ *Wylly v. Collins*, 9 Ga. 223; *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705; *Manderson's Appeal*, 113 Pa. St. 651, 6 Atl. 346; *Cater v. Everleigh*, 4 Des. Eq. (S. C.) 19.

¹⁸ See § 45, notes 1-5.

¹⁹ By will a business was left to a trustee with full power to operate it for the widow and other beneficiaries. The trustee did so until the business became insolvent and the trustee also. He allowed creditors to confess judgment against the trust estate by way of preference. Held: These judgments will be set aside and the trust fund administered for all the creditors of the business. A trust estate embarked in trade is liable to creditors for debt. *Woddrop v. Weed*, 154 Pa. St. 307, 312, 26 Atl. 375.

¹ See § 33.

² *Campbell v. R. R.*, 1 Woods 368 (U. S.) (trustee for bondholders during foreclosure proceedings); *Ashuelot R. R. v. Elliott*, 57 N. H. 397 (trustee for bondholders in possession); *Allison's Estate*, 183 Pa. St. 555 (assignee for creditors).

gaged property at foreclosure sale to protect the interests of the bondholders and reselling it, although the mortgage did not contain the usual provision authorizing him to do so,³ but subject to the right of the bondholders to hold him accountable for negligence in reselling at a loss.⁴ The fact that one of the voting trustees is an officer of a railroad with which he votes to consolidate does not render his vote illegal in the absence of proof of unfair terms.⁵ On the other hand, a holder of voting trust certificates has been allowed to enjoin the trustee from voting to increase the number of directors.⁶ A trustee is liable for losses due to failure to use the care of an ordinarily prudent man.⁷ The trust deed usually contains a stipulation that the trustee shall be liable only for his own wilful default or neglect. These stipulations have been held valid,⁸ and he has been held not liable for failure to act through mistake or misconception of his duty.⁹ Wilful default by a trustee means "intentionally making way with the trust property, and a wilful neglect means such reckless

³ *Nay v. Scranton Trust Co.*, 240 Pa. St. 500, 87 Atl. 843.

⁴ *Watson v. Scranton Trust Co.*, 240 Pa. St. 507, 87 Atl. 845.

⁵ *Dady v. Georgia*, 112 Fed. 838.

⁶ *Byington v. Piazza*, 115 N. Y. S. 918, 131 App. Div. 895.

⁷ *Re Leventritt*, 58 N. Y. S. 256, 40 App. Div. 429 (assignee for creditors); *Wright's Estate*, 182 Pa. St. 90, 38 Atl. 151 (ditto).

⁸ *Black v. Wiedersheim*, 143 Fed. 359 (trustee for bondholders); *Stratton v. European Co.*, 74 Me. 422 (ditto); *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782 (ditto).

By certification of bonds the trustee under the mortgage merely identifies them and does not increase his liability. *Bauerschmidt v. Maryland Trust Co.*, 89 Md. 507, 43 Atl. 790; *Tschetinian v. City Trust Co.*, 186 N. Y. 432, 79 N. E. 401. See *Dunning v. Bates*, 186 Mass. 123, 71 N. E. 309.

Where the mortgage provided that the proceeds of the bonds were to be paid out only on a certificate and no express stipulation relieved the trustee, he was held liable to bondholders on an implied covenant to see that the proceeds were paid out only on such certificate. *Rhineland v. Farmers Co.*, 172 N. Y. 519, 65 N. E. 499.

⁹ *Black v. Wiedersheim*, 143 Fed. 359 (trustee for bondholders).

indifference to true interests of the trust as to amount to or partake of a wilful violation of duty. The difference between neglect of duty by a trustee and a wilful neglect or default by a trustee is not unlike the difference between the liability of one who is bound to exercise due care and the liability of the owner of land to a trespasser.”¹⁰ A trustee is not liable for misconduct of a co-trustee if he himself is blameless.¹¹ It is not necessarily negligent to allow the co-trustee to handle funds alone,¹² but he cannot sleep on his trust.¹³ The beneficiary is entitled to information at reasonable times as to the trust estate,¹⁴ and to accounts.¹⁵ There is no objection to the trustee being also interested as beneficiary in the trust estate.¹⁶ A voting trustee may sell his own stock and that is not a ground for obliging him to distribute the trust stock.¹⁷ The purchaser of voting trust certificates may compel the transfer of stock by the trustee.¹⁸ But a claimant of stock deposited by another cannot compel the trustee to surrender it until the trust certificate is surrendered to him.¹⁹ Such certificates have been held not evidence

¹⁰ *Warren v. Pazolt*, 203 Mass. 328, 347, 89 N. E. 381. As to what is gross negligence of trustee for bondholders who had limited his liability to that, see *Hunsberger v. Guaranty Trust Co.*, 150 N. Y. S. 190, 164 App. Div. 740.

¹¹ *Colburn v. Grant*, 181 U. S. 601, 45 L. ed. 1021, 21 S. Ct. 737.

¹² *Dyer v. Riley*, 51 N. J. Eq. 124, 26 Atl. 327; *Purdy v. Lynch*, 145 N. Y. 462, 40 N. E. 232.

¹³ *Holmes v. McDonald*, 226 Ill. 169, 80 N. E. 714.

¹⁴ *Perrin v. Lepper*, 72 Mich. 454, 543, 40 N. W. 859; *Hancox v. Wall*, 28 Hun 214, 218; *Barbour v. Cummings*, 26 R. I. 201, 58 Atl. 660.

¹⁵ *Orr v. Yates*, 209 Ill. 222, 239, 70 N. E. 731.

¹⁶ *Heard v. March*, 12 Cush. 580.

¹⁷ *Haines v. Kinderhook*, 53 N. Y. S. 368, 33 App. Div. 154.

¹⁸ *Brissell v. Knapp*, 155 Fed. 809.

A purchaser of a voting trust certificate gave it to the vendor to get it transferred. He pledged it for his own debt. Held: Valid pledge. *Union Trust Co. v. Oliver*, 140 N. Y. S. 681, 155 App. Div. 646.

¹⁹ *Bean v. American L. & T. Co.*, 122 N. Y. 622, 26 N. E. 11 (voting trust).

of a debt and so not taxable as such.²⁰ A transfer of voting trust certificates is taxable under the New York statute.²¹

In addition to the right of a trustee to indemnity against the trust estate already referred to,²² the trustee has a right against his beneficiary personally for indemnity against liabilities incurred by him arising out of his ownership of the trust property, such as a liability for assessments on shares in corporations held by him in trust for a syndicate.²³ It has been held, however, that a beneficiary was not bound by a stipulation in the declaration of trust obligating her to reimburse the trustee for certain expenditures unless she assented to it and that if she did not execute the declaration of trust she might show by oral evidence that her consent was absolute or conditional, that is, that she reserved the right to withdraw. If she assented without qualification she could not afterward annex a condition to her assent without the consent of the parties interested.²⁴ In other words, the issue in this case was not whether the trustee had a right of indemnity against the beneficiaries, but who were the beneficiaries.

Although a court of equity is the proper tribunal to adjust the mutual rights of trustee and beneficiary, it has been held that after the trust has been terminated by sale of the trust property under foreclosure proceedings, the trustee may bring an action of contract at law against the beneficiaries on an express agreement in the declaration of trust by the beneficiaries to reim-

²⁰ *Comm. v. Union Co.*, 192 Pa. St. 507, 43 Atl. 1010.

²¹ *U. S. v. State of N. Y.*, 208 N. Y. 144, 101 N. E. 783.

²² § 43, note 12 *et seq.*

²³ *Hardoon v. Belilios*, (1901) A. C. 118, 125. See § 64, notes 2 and 3.

²⁴ *Cunniff v. McDonnell*, 196 Mass. 7, 10, 81 N. E. 879.

burse the trustees for certain expenses.²⁵ A trustee in most of the United States is entitled to receive compensation for his services,²⁶ and when reasonably necessary to employ counsel and pay his charges out of the estate.²⁷

The nature of the interest of the beneficiary in the trust *res* has already been discussed.²⁸

§ 45. Representation of Beneficiaries by the Trustee

The ordinary rule is that the beneficiaries must be parties to all suits in equity affecting the trust,¹ but not to actions at law.² The trustee may, however, be held to represent the beneficiaries to such an extent that a decree against him will bind them though not formally joined as parties. "It cannot be doubted that under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done

²⁵ *Cunniff v. McDonnell*, 196 Mass. 7, 10, 81 N. E. 879.

²⁶ *Barney v. Saunders*, 16 How. 535, 542; *Barrell v. Joy*, 16 Mass. 221; *McDougal v. Fuller*, 148 Cal. 521, 83 Pac. 701 (assignee for creditors); *Re Hulburt*, 89 N. Y. 259 (ditto); *Coleman's Estate*, 200 Pa. St. 29, 49 Atl. 798 (ditto).

Contra. In England, *Re Pooley*, 40 Ch. D. 1, and in Delaware State *v. Platt*, 4 Harr. 154.

A committee of creditors managing a business in the hands of trustees under an insolvent assignment, were entitled to sue the creditors for compensation for their services. *Bingaman v. Hickman*, 115 Pa. St. 420, 8 Atl. 644.

²⁷ *Teague v. Corbitt*, 57 Ala. 529; *National Bank v. Dulaney*, 96 Md. 159, 171, 53 Atl. 944 (assignee for creditors); *Forward v. Allen*, 6 Allen 494, 497; *Berkeley v. Green*, 102 Va. 378, 381, 46 S. E. 387 (assignee for creditors).

²⁸ See § 21.

¹ *Zehnbauer v. Spillman*, 25 Fla. 591, 598, 6 So. 214; *McGraw v. Bayard*, 96 Ill. 146, 153.

² *Cheatham v. Rowland*, 92 N. C. 340.

against him as well as what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger or to one by a stranger against him to defeat it in whole or in part."³ The beneficiaries are then bound by the judgment against the trustee in the absence of fraud or collusion.⁴ The court, of course, may in its discretion join the beneficiaries as parties.⁵ The Federal courts obtain jurisdiction through diverse citizenship of the trustee though the beneficiary is a resident of the same State with the adverse party.⁶ The trustee under the usual form of mortgage to secure bondholders in many respects is the representative of his beneficiaries. Thus notice to him of the existence of a prior encumbrance on the property mortgaged has been held to be notice to the bondholders.⁷ The trustee is the appropriate party to foreclose the mortgage.⁸ He cannot delegate this duty to

³ "From this it appears that he was not only invested with the legal title to the property, but that all parties relied upon his judgment and discretion for the protection of their respective interests. A clear intent is manifested of relieving the creditors from the necessity of looking personally to the conversion of the securities or to the preservation of the trust." *Trust of certain land for the benefit of creditors*. *Kerrison v. Stewart*, 93 U. S. 155, 160, 161, 23 L. ed. 843; *Cheatham v. Rowland*, 92 N. C. 340, 343; see *Winslow v. Minn., etc. R. R.*, 4 Minn. 313, 317.

⁴ *Kerrison v. Stewart*, 93 U. S. 155, 160, 23 L. ed. 843.

⁵ *Francis v. Harrison*, 43 Ch. D. 183.

⁶ *Dodge v. Tulleys*, 144 U. S. 451, 456, 36 L. ed. 501, 12 S. Ct. 728.

Jurisdiction was denied where the beneficiary was a non-resident, but the trustee resided in the same State as the other party. All the trustees must be non-resident. *Shipp v. Williams*, 62 Fed. 4.

⁷ *Coe v. N. J. R. R. Co.*, 31 N. J. Eq. 105; *Miller v. Rutland Co.*, 36 Vt. 452, 484; *Fidelity Co. v. Shenandoah Co.*, 32 W. Va. 244, 9 S. E. 180. But see *Johnson County v. Thayer*, 94 U. S. 631, 24 L. ed. 133; *Curtis v. Leavitt*, 15 N. Y. 9, 194, 195.

⁸ *Consolidated Water Co. v. San Diego*, 89 Fed. 272; *Shaw v. Nor-*

the holders of a majority of the bonds and is liable to a minority for damages sustained by such a course.⁹ But if he has a discretion as to action or not, he may properly follow the desires of holders of a majority of bonds acting in good faith.¹⁰ In a foreclosure suit by the trustee the corporation cannot set off a claim against the individual bondholder.¹¹ Bondholders can proceed themselves against the mortgagor to protect the trust estate only if redress cannot be obtained through the trustee.¹² Thus it is held that if the trustee refuses or unreasonably neglects to act, bondholders may proceed independently after request to the trustee,¹³ or they may proceed against the trustee and compel him to act.¹⁴ When by the terms of the mortgage the trustee is entitled to indemnity against loss or expense before he can be compelled to act, and refuses to proceed without

folk County R. R. Co., 5 Gray 162; *Virginia Co. v. Fisher*, 104 Va. 121, 51 S. E. 198; *Re Chickering*, 56 Vt. 82.

Contra. Bondholders necessary parties. *Tyson v. Applegate*, 40 N. J. Eq. 305; *Davis v. Hemingway*, 29 Vt. 438; *Day v. Wetherby*, 29 Wis. 363.

Bondholders may be admitted in the discretion of the court. *Fink v. Bay Shore Co.*, 144 Fed. 837.

Failure of the trustee to contest a prior mortgage may be sufficient. *Met. Trust Co. v. Central Trust Co.*, 93 C. C. A. 671, 168 Fed. 1021.

⁹ *Merrill v. Farmers Co.*, 24 Hun 297.

¹⁰ *First Bank v. Shedd*, 121 U. S. 74, 30 L. ed. 877, 7 S. Ct. 807; *State v. Brown*, 73 Md. 484, 21 Atl. 374.

¹¹ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423, 20 S. Ct. 311.

¹² Bill by bondholders on behalf of all others against the trustees under the mortgage and directors of the corporation for allowing lessees of the corporation's mine to waste it. Held: Bondholders can proceed themselves only if redress cannot be obtained through the trustee. Negligence of the trustees is not enough. Directors of the corporation owe no fiduciary obligation to the bondholders. *Young v. Haviland*, 215 Mass. 120, 123, 102 N. E. 338.

¹³ *Webb v. Vt. Cent. Ry. Co.*, 9 Fed. 793; *Siebert v. Minn. Co.*, 52 Minn. 148, 53 N. W. 1134; *Schultze v. Van Doren*, 65 N. J. Eq. 764, 55 Atl. 1133; *O'Beirne v. Allegheny Co.*, 151 N. Y. 372, 45 N. E. 873. See *Citizens Bank v. Los Angeles Co.*, 131 Cal. 187, 63 Pac. 462.

¹⁴ *First Nat. Co. v. Salisbury*, 130 Mass. 303.

it, the bondholders must furnish it before they are entitled to act independently.¹⁵ When, however, the trustee has taken a position where his interest conflicts with his duty as trustee, no request is needed,¹⁶ and so when for any other reason an appeal to the trustee would obviously be useless.¹⁷

§ 46. Management of Trust Estate

Courts will not interfere with the directions prescribed in the trust deed for the management and control of the trust ¹ unless the preservation of the estate requires it.² The trustee cannot delegate his authority,³ but, of course, may appoint agents to perform purely ministerial functions.⁴ In the absence of any provisions to the contrary in the trust instrument, the trustees must act jointly in matters involving the exercise of their discretion.⁵ In purely ministerial matters or

¹⁵ *Falmouth Bank v. Cape Cod Co.*, 166 Mass. 550, 44 N. E. 617.

¹⁶ *American Co. v. Kentucky Co.*, 51 Fed. 826.

¹⁷ *Wheelwright v. St. Louis Co.*, 56 Fed. 164 (office vacant); *Ettlinger v. Persian Co.*, 142 N. Y. 189, 36 N. E. 1055.

In California it is held that when the trustee need act only at the request of holders of a majority of bonds and is therefore justified in refusing to act, a minority may proceed directly. *Citizens Bank v. Los Angeles*, 131 Cal. 187, 63 Pac. 462. See *Western Penn. Hospital v. Mercantile Co.*, 189 Pa. St. 269, 42 Atl. 183.

For an unusual form of trust certificate in which the same rule was applied, see *Land Title & Trust Co. v. Asphalt Co.*, 127 Fed. 1; *Land Title & Trust Co. v. Tatnell*, 132 Fed. 305.

Bondholders were allowed to intervene in a receivership without joining the trustee when he was out of the jurisdiction. *Anthony v. Campbell*, 112 Fed. 212.

¹ *Winthrop v. Attorney General*, 128 Mass. 258; *Pennington v. Met. Museum of Art*, 65 N. J. Eq. 11, 23, 55 Atl. 468.

² *Johns v. Johns*, 172 Ill. 472, 50 N. E. 337.

³ *Suarez v. Pumpelly*, 2 Sandf. Ch. 336, 340.

⁴ *Spenglar v. Kuhn*, 212 Ill. 186, 72 N. E. 214; *Donaldson v. Allen*, 182 Mo. 626, 81 S. W. 1151.

⁵ *Hosch Lumber Co. v. Weeks*, 123 Ga. 336, 51 S. E. 439; *Coleman v. Connolly*, 242 Ill. 574, 90 N. E. 278.

in an emergency, to preserve the fund, one may act alone.⁶ Courts uphold stipulations in the trust deed giving a majority of the trustees or less than all the power to act even in matters involving discretion,⁷ but even in such cases it has been held that those not acting are entitled to notice of the contemplated action and an opportunity to be heard.⁸ A trustee has the right under certain circumstances to seek the advice of a court of equity as to his rights and obligations in advance of acting.⁹ This is not, however, a means whereby the trustee can relieve himself of the entire burden of managing the trust. The requisites for a bill for instructions have been said to be "the possession of a fiduciary fund of which some disposition is necessarily to be made presently; conflicting claims or the probability thereof; and the existence of no other means of determining rights or demands so as to protect a trustee from the risks of future liability or controversy."¹⁰ A decree on such a petition for instructions, when the beneficiaries are parties, is *res judicata* as to them, if they later try to make the trustee account on a different basis.¹¹ A trustee may transact business in other States under the protec-

⁶ Vandever's Appeal, 5 Watts & G. 405.

⁷ Duckworth v. Ocean Co., 98 Ga. 193, 26 S. E. 736; Barney v. Chittendon, 2 G. Greene 165 (Ia.); Ratcliffe v. Sangston, 18 Md. 383, 389.

⁸ Loud v. Winchester, 52 Mich. 174, 185, 17 N. W. 784 (trust for creditors); Heard v. March, 66 Mass. 580, 584.

Of course an act by one trustee in the name of both may be ratified by the other. Ubbhoff v. Brandenburg, 26 App. D. C. 13.

⁹ Diggs v. Fidelity Co., 112 Md. 50, 75 Atl. 517; Chase v. Ladd, 155 Mass. 417, 29 N. E. 637; Hoagland v. Cooper, 65 N. J. Eq. 407, 56 Atl. 705.

¹⁰ Bullard v. Attorney General, 153 Mass. 249, 26 N. E. 691. See Hewitt v. Green, 77 N. J. Eq. 345, 77 Atl. 25.

¹¹ Thorn v. De Breteuil, 179 N. Y. 64, 79, 85, 71 N. E. 470 (here some of the beneficiaries were infants, but the court said they had been sufficiently represented by the adults).

tion of the Constitution of the United States and a statute purporting to prohibit the transfer of any real or personal property in Indiana to a non-resident trustee except by will was held unconstitutional.¹²

§ 47. Change of Trustee

A court of equity can always remove a trustee for cause.¹ Assignees for the benefit of creditors have been removed for misconduct and incapacity and a successor appointed on petition of creditors for whose benefit the assignment was made.² Trustees under mortgages securing bonds have been removed because of residence in a State at war with that in which the trust is being administered,³ and even for removal of residence to a foreign country,⁴ but not for mere temporary absence.⁵ A trustee of a voting trust has been removed for electing himself as officer at an excessive salary and he has been made to account for the salary.⁶ The legislature cannot by statute substitute a new trustee, for that would impair the obligation of contract.⁷ Where the trust deed itself provides for the removal of a trustee and appointment of his successor, the beneficiaries may remove

¹² *Roby v. Smith*, 131 Ind. 342, 30 N. E. 1093; *Shirk v. Lafayette*, 52 Fed. 855; *Farmers Co. v. Chicago*, 27 Fed. 146, 149.

¹ *May v. May*, 167 U. S. 310, 42 L. ed. 179, 17 S. Ct. 824.

² *Haven v. Sibbald*, 41 Atl. 371 (N. J.); *Bryson v. Wood*, 187 Pa. St. 366, 41 Atl. 473; *Estate of Ahl*, 192 Pa. St. 370, 43 Atl. 956; *Taylor v. Mahoney*, 94 Va. 508, 27 S. E. 107; *Morgan v. South Co.*, 100 Wis. 465, 76 N. W. 354; *State v. Johnson*, 105 Wis. 164, 178, 83 N. W. 320.

³ *Ketcham v. Mobile, etc. Co.*, 2 Woods 532 (U. S.).

⁴ *Farmers Co. v. Hughes*, 11 Hun 130.

⁵ *Equitable Co. v. Fisher*, 106 Ill. 189.

⁶ *Elias v. Schweiger*, 50 N. Y. S. 180, 27 App. Div. 69. See *Lawrence v. Curtis*, 191 Mass. 240, 77 N. E. 314; *Barbour v. Weld*, 201 Mass. 513, 87 N. E. 909.

⁷ Trustee under mortgage securing bonds. *Knapp v. R. R. Co.*, 20 Wall. 117, 122; *Fletcher v. Rutland Co.*, 39 Vt. 633.

him so long as they act in good faith.⁸ Its provisions should be strictly followed or the acts of the successor may be held invalid.⁹ A voting trustee resigned and a new one was substituted in accordance with the terms of the trust deed. There was litigation as to some stock and the trustee wished to be fully protected. He was allowed to file a bill in equity to have the court accept his resignation, pass on his accounts and appoint his successor.¹⁰ So an assignee for the benefit of creditors may be permitted by the court to resign.¹¹ A new trustee may be appointed where a vacancy exists from any of the usual causes.¹²

X ⁸ *May v. May*, 167 U. S. 310, 42 L. ed. 179, 17 S. Ct. 824; *March v. Romare*, 116 Fed. 355 (C. C. A.).

⁹ *Farmer's Co. v. Chicago*, 27 Fed. 146; *Equitable Co. v. Fisher*, 106 Ill. 189; *Richards v. Merrimack Co.*, 44 N. H. 122. See *Shaw v. Norfolk County R. R. Co.*, 5 Gray 162.

¹⁰ *Moore Co. v. National Sav. Co.*, 218 U. S. 422, 54 L. ed. 1093, 31 S. Ct. 64.

¹¹ *Andrews v. Wilson*, 114 Ky. 671, 71 S. W. 890.

¹² *Brown v. Parker*, 97 Fed. 446 (assignee for creditors); *Clafin Co. v. Middlesex Co.*, 113 Fed. 958 (ditto); *Tuttle v. Merchants Bank*, 19 Mont. 11 (ditto); *Rogers v. Pell*, 166 N. Y. 565, 60 N. E. 265 (ditto).

CHAPTER IV

UNASSOCIATED GROUPS

§ 48. In General

THERE are numerous instances of groups of individuals engaged in business which do not fall in either of the classifications yet discussed, that is, they are neither partnerships nor trusts. It is important, however, for purposes of comparison with true associations to illustrate briefly the nature of these groups. They take a great variety of forms but involve only an application of the law of agency.

§ 49. Lloyd's Insurance

In some jurisdictions it is still common to carry on the business of insurance in an ancient form which is known as Lloyd's. To some extent such insurance has been regulated by statute. The policy varies from the usual form in that it is made not by a single insurer, but by a group of insurers who expressly contract, not as partners, but as individuals, and who undertake to be liable only each for his own *pro rata* share of the loss. They act through a designated agent upon whom it is agreed process may be served which shall be binding upon all insurers. Their transactions are of such a nature that the question whether they are partnerships or not has seldom been expressly decided, the court having simply to determine whether their obligation was joint or not. In several cases they are described

simply as associations, or are said to fall within the description of statutes restricting the right of foreign associations to transact business in that State.

A Lloyd's insurance association which had been petitioned into involuntary bankruptcy claimed that a petition could not be filed against it as a separate entity, but only against the individual members as partners. The policies issued expressly made the liability of the underwriters several and not joint, "as though each underwriter had issued a separate and individual policy." The business was conducted by managers, but it was organized under articles of association, its members held meetings and did business and issued policies in its company name, viz., Seaboard Fire Underwriters. The court held that the United States Bankruptcy Act specifies "any unincorporated company" as well as person and corporation as subject to involuntary bankruptcy and that this was an unincorporated company within the meaning of the act.¹

A statute authorized *quo warranto* against "an association of persons acting as a corporation within the State without being legally incorporated." The court held that this applied to a foreign fire Lloyd's association issuing policies in the State because they professed to limit their liability to the amount of money contributed by each and assumed to give perpetuity to the business by making membership certificates transferable. The fact that they might be held individually liable, the court said, did not relieve them of the charge of having tried to act as a corporation. They were an association because they acted under a com-

¹ *Re Seaboard Fire Underwriters*, 137 Fed. 987 (D. C. — N. Y.).

pany name, viz., "Guarantee and Accident Lloyds, New York," and the subscribers chose an advisory committee who controlled the capital like a board of directors and executed a power of attorney to the same individual to manage the business.²

On a petition for license to engage in the insurance business the Alabama court said: "According to the showing made by the petition the business was to be carried on in the manner of the ancient Lloyds. The respective liabilities and limitations of liability of the individual members to each other . . . are such that the business of insurance thus carried on may be included within the scope of the term 'Company,' 'association,' or 'individual.' Each underwriter is individually liable for a fixed amount, but not for the whole or for any part of another underwriter's liability, yet all act together to effect the contract of insurance. In the former respect it is an individual undertaking which becomes binding by the separate action of all. In the latter respect the policy is also the contract of a 'company' or 'association.' It is not a partnership in a legal sense and in no sense can it be considered a corporation. It is an association or company of individuals organized to do an insurance business upon certain stipulations and conditions evidenced by their written agreement." The Alabama statute requiring statements, etc., from foreign companies did not apply to any but corporations. Hence the plaintiff was held entitled to his license.³

² *State v. Ackerman*, 51 Ohio St. 163, 196, 198, 87 N. E. 828; acc. *Greene v. People*, 150 Ill. 513, 21 N. E. 605.

³ *Hoadley v. Purifoy*, 107 Ala. 276, 289, 18 So. 220.

The Georgia statute forbidding insurance companies to transact business in the State without a license was construed as applicable only to corporations. Hence the agent of "the Guarantee and Accident

In these cases and in some others they have been organized under agreements which provide for association in a common enterprise in a way that should properly be held a partnership. A certificate was issued by the Buffalo Fire and Marine Underwriters insuring "subject to the conditions of open policy No. — at the Buffalo Agency." "Valid when countersigned by the authorized agent of the Company at Buffalo." The open policy in fact was a Lloyd's policy of nineteen underwriters. The certificate was issued in Ohio. The New York Court of Appeals held that the New York law forbade doing business under a fictitious name and that the defendant underwriters were liable as a company since they called themselves such in the certificate and an association in their articles. It further held that if it were deemed a company with limited liability this notice of limitation of liability was insufficient. "This company or association was not incorporated, was in no wise exempted by law from partnership liability, except as it should in its agreement with the insured actually and explicitly so exempt itself. This does not mean that seemingly constructive

Lloyds" which the court said was "a voluntary unincorporated association consisting of one hundred natural persons" was not liable for the penalty. *Fort v. State*, 92 Ga. 8, 13, 18 S. E. 14.

An insurance scheme whereby the insured paid premiums to an attorney in fact in Kansas City, who after deducting twenty-five per cent. for his services and expenses used the rest as a mutual insurance fund for the policy holders called the Manufacturing Lumberman's Underwriters, was held to be an association transacting the business of insurance in Mississippi and subject to the laws regulating insurance. The statute expressly included associations. *State v. Alley*, 96 Miss. 720, 760, 51 So. 467.

Statute of Missouri construed to prohibit transacting business of insurance by individuals or unincorporated associations as well as corporations without compliance with its provisions. State can regulate this business if no discrimination between individuals. Hence the agent of a New York Lloyd's was subject to the statute. *State v. Stone*, 118 Mo. 388, 24 S. W. 164.

notice which is so contrived and intended as to be hidden in the letter and not to be perceived or suggested until searched out of its lurking place after a loss. It means a notice so plain and fair that the party to be charged with it either receives it or it is his own fault if he does not." But an underwriter whose name was printed in the policy was not liable because he notified the attorney that he retired before this policy was issued. He never attended any meetings. Although he did not recall the power of attorney or publish notice, plaintiff did not know he ever had been a member of the association and was not misled.⁴ In other cases where the nature of Lloyd's groups was in question the courts have treated them not as associations but as liabilities in severalty.⁵ In still other cases

⁴ *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143, 150, 62 N. E. 167, 169.

A statute imposed an assessment on premiums in favor of the plaintiff who sued the attorney of a Lloyds on the theory that he was the treasurer of an unincorporated association of over seven members who by another statute could be sued in that way. Held: Though the Lloyds' policy is one of individual liability the members are an association and act as such in issuing the policies and collecting the premiums which belong to the association. The attorney performs the functions of a treasurer and so can be sued under the statute, there being no formal treasurer or president. *N. Y. Board of Fire Underwriters v. Whipple*, 55 N. Y. S. 188, 36 App. Div. 49.

A Lloyds reinsured its risks with the defendant. The contract was made in the name under which they were doing business, viz., "Individual Underwriters at Commercial Lloyds." The plaintiff, one of the underwriters having paid losses, brought an action against the defendant on the contract. Held: Cannot be maintained without joining all members of the association. The contract was made "not with the individual members composing the association but with the association itself." It is a joint obligation. *Thompson v. Colonial Assurance Co.*, 70 N. Y. S. 85, 60 App. Div. 325.

⁵ A State cannot impose restrictions on citizens of another State doing business in it which it does not apply to its own citizens. At common law an individual can write insurance and no statute of Illinois forbids. If the requirements imposed on foreign corporations are meant to be applicable to individuals, they are unconstitutional. Hence the agent of a New York Fire Lloyds was not liable to the penalty. *Barnes v. People*, 168 Ill. 425, 429, 48

no inference can be drawn from the decision as to the attitude of the court on this point.⁶ It should be noted,

N. E. 91. See *Warfield-Howell Co. v. Williamson*, 233 Ill. 487, 495, 84 N. E. 706.

"Of course the underwriters do not constitute a joint stock company or association." *Gough v. Satterlee*, 52 N. Y. S. 492, 497, 32 App. Div. 33.

Action against members of several Lloyds companies for services rendered apparently in connection with litigation. Held: Not sufficient evidence of authority of general manager to bind the defendant. The power of attorney should be produced or its loss proved as preliminary to secondary evidence of its contents. It should also appear that defendant was an underwriter on each policy with respect to which plaintiff performed services. *Langbein v. Tongue*, 54 N. Y. S. 145, 25 Misc. 757.

A statute forbidding acting as agent of a foreign insurance company without a license did not apply to the agent of a Lloyds because the statute applies only to agents of corporations. "The policy in question was undoubtedly a policy executed by one hundred individual persons and contracting for individual liability of all." *Comm. v. Reinoehl*, 163 Pa. St. 283, 290, 29 Atl. 896.

No action can be brought on a Lloyds policy since insurance by individuals is forbidden by statute in Pennsylvania. *Weed v. Cuming*, 12 Penn. Super. Ct. Rep. 412, 416.

A Lloyds policy subscribed by "The Shipowners' Syndicate (Re-assured) John M. Corderoy, Manager," followed by the names of individuals with the proportion of the insurance effected by each indicated after his name contained a clause, "It is specially agreed that the assured are hereby entitled, by way of further security for the performance of the obligations of the subscribing underwriters and of each and every of them, to the benefit by way of first charge of the policies of re-insurance effected or to be effected and of all moneys received thereunder." Held: The several liability usually resulting from this form of policy was not enlarged by this clause which seems to have been intended to prevent the loss of the security by insolvency of any of the underwriters. It was contended that the word "syndicate" imported acting together and meant something equivalent to firm or partnership. But the court said "the word 'syndicate' does not indicate in what way the members are acting together." *Tyser v. Shipowners' Syndicate*, (1896) 1 Q. B. D. 135.

⁶ An action was brought "against the members of a Lloyds insurance association composed of individuals residing for the most part in Canada and known as the New York Commercial Underwriters on a policy of insurance against perils of the sea." The individual underwriters insured "jointly and severally." Held: The declaration was not demurrable because some of the defendants named were out of the jurisdiction and could not be served. *Richmond Cedar Works v. Buckner*, 181 Fed. 424 (C. C. — N. Y.).

A Florida statute imposing conditions on foreign unincorporated associations and individuals issuing policies in that State which were not

however, that even the cases that call the underwriters an association usually recognize that their liability as insurers is several and not as partners. In other words, in the only business they intend to transact they do not act as associates but as unassociated individuals. There should be no difficulty, therefore, in so drawing their organization agreement that no association will result from their activities and in the normal case they will be simply a group of independent contractors acting through a common agent.

It is usually provided in these policies that no action shall be brought on it except against the manager as attorney in fact representing all the underwriters and each underwriter agrees to abide by the result of such action as fixing his individual responsibility under the policy. This means that the action on the policy is to be brought against the manager and the amount of the loss fixed and *pro rated* among the underwriters. The validity of these stipulations has been sustained where the manager against whom the action is to be brought is also one of the underwriters and therefore is liable in contract to the plaintiff.⁷ When judgment has been

imposed on citizens of Florida was held unconstitutional. *State ex rel. Hoadley v. Board of Ins. Commissioners*, 37 Fla. 564, 574, 29 So. 772.

A majority of the court held constitutional the statute of Pennsylvania forbidding the issue of policies of insurance by individuals, partnerships or associations. It did not discriminate against citizens of other States. *Comm. v. Vrooman*, 164 Pa. St. 306, 20 Atl. 217.

The statute of Pennsylvania making it unlawful for any person, partnership or association to execute policies of fire insurance in the State makes it improper to license the agent of a New York Lloyds Association. Opinion of Attorney General, *re License in Pennsylvania*, 3 Pa. Dist. Rep. 822.

⁷ Where the attorneys are also underwriters action is properly brought against them, the amount of the loss and the liability of each underwriter determined. It will be binding upon the underwriters like any agreement to be bound by a judgment against another. *Leiter v. Beecher*, 37 N. Y. S. 1114, 2 App. Div. 577. Acc. *Lawrence v. Schaefer*,

obtained against the attorney in accordance with the terms of the policy an action may be brought against the individual underwriter on his agreement to abide by that judgment. He is bound by that judgment because he agreed to be and can raise no question as to the validity of the policy.⁸ Where the attorney was not also an

42 N. Y. S. 992, 19 Misc. 239, aff'd 46 N. Y. S. 719, 20 App. Div. 80; *Stieglitz v. Belding*, 45 N. Y. S. 670, 20 Misc. 297.

An additional clause, however, requiring the action to be brought only in a specified court of New York, was void. *McLean v. Tobin*, 109 N. Y. S. 926, 58 Misc. 528.

"There is a wide difference in principle between restricting the power of the courts to adjudicate on the rights of litigants arising under contracts and the provision that a fund owned by the persons liable in damages may be reached in an action against the custodians of that fund and the individual liability of the owners of the fund shall be fixed by the judgment in such actions and enforced against them after the fund is exhausted." Action was properly brought against the attorneys. *Compton v. Beecher*, 44 N. Y. S. 887, 890, 17 App. Div. 38.

Judgment against the attorney is a condition precedent to action against the individual underwriter on a Lloyds policy and must be pleaded and proved by the plaintiff. *Ketchum v. Belding*, 68 N. Y. S. 1099, 58 App. Div. 295.

A stipulation in a policy that no action shall be brought upon it against more than one underwriter at a time and that the others agree to abide by it is valid and is a sufficient answer to an action against all the underwriters. The action should be dismissed as against all but one. *New Jersey, etc. Works v. Ackerman*, 39 N. Y. S. 585, 6 App. Div. 540.

After the insured recovered judgment by default against the attorney, he brought an action against the underwriter. Later the attorney had the judgment vacated and a trial in which plaintiff again got judgment. This he now seeks to set up by supplemental complaint. Held: By the terms of the policy that "no action shall be brought against more than one underwriter at any time" is meant "at any one time" and this was not violated here. There is no provision in this policy requiring judgment against the attorney as a condition precedent. *Peabody v. Germain*, 57 N. Y. S. 860, 40 App. Div. 146.

⁸ Hence the fact that the Lloyds had not complied with the statute requiring all persons, partnerships or associations to make the same deposits with the insurance commissioner as a corporation was immaterial. *Conant v. Jones*, 64 N. Y. S. 189, 50 App. Div. 336.

An action was brought in New Jersey on a Lloyds policy against an underwriter after judgment against the attorney in New York. The action was on the policy, not on the judgment. Held: The obtaining of the judgment is merely a condition precedent to action on the policy against the underwriters. It could not merge the cause of action against the underwriters because they are not named as parties. The amount it fixes is at least *prima facie* evidence as against this defendant (will

underwriter action has been allowed directly against the underwriters on the ground that the stipulation that action must first be brought against the attorney is incapable of performance and so not a condition precedent to an action directly against the underwriters. The attorneys could not be sued because, not being underwriters, they were not parties to the contract of insurance and because they acted for known principals they could not be sued as agents.⁹ When at the time

not decide if conclusive). When the attorney is also an underwriter it is a valid condition. Such policies are valid in the absence of statutes forbidding them and the underwriters may do business in other States. *Enterprise Co. v. Mundy*, 62 N. J. L. 16, 42 Atl. 1063, 1065.

An action was brought against the attorney. The policy provided for apportionment of the funds in the hands of the attorney among all claims *pro rata*. It was alleged that there were losses requiring such apportionment. Held: The policy does not contemplate an equitable proceeding for accounting and apportionment as a condition precedent to action against the individual underwriters, but an action at law with execution on the judgment. Hence it is to be satisfied out of the trust fund in the hands of the attorney, if any, for its full amount. Hence evidence of the existence of other claims was properly excluded. Other persons not parties of record cannot be bound by such a judgment. The underwriter cannot be bound individually by this judgment because not a party. The attorney is not trustee of the underwriters for that purpose. *Gough v. Satterlee*, 52 N. Y. S. 492, 32 App. Div. 33.

⁹ *Knorr v. Bates*, 35 N. Y. S. 1060, 14 Misc. 501; *Biggett v. Hicks*, 42 N. Y. S. 236, 18 Misc. 593; *Railli v. White*, 46 N. Y. S. 376, 20 Misc. 635.

Where the attorney is not himself an underwriter and never in any way became liable thereon, the condition precedent that action shall first be brought against the attorneys is against public policy and void. *Farjeon v. Fogg*, 37 N. Y. S. 980, 16 Misc. 219.

When the attorney is not an underwriter he cannot be sued in spite of the provision in the policy. Under the New Jersey statutes an association may be sued in its association name on any action affecting the common property. There was an association and so action properly brought. *Bank of Toronto v. Manf. & Merch. Fire Ass'n*, 63 N. J. L. 5, 13, 42 Atl. 761.

A Lloyds policy contained a clause not expressly authorizing an action against the attorney but forbidding an action against more than one underwriter and binding the others by the judgment therein. Held: This clause was not binding since not specifically mentioned in the power of attorney under which the policy was issued. Hence suit could be brought against several underwriters simultaneously. A clause requiring suit in the highest court of the State was void as against

action is brought the plaintiff could not perform the condition precedent, action has been allowed directly against the underwriters, as in a case where the attorneys have tried to resign and substitute others and the plaintiff would have to decide at his peril which was the proper one to sue,¹⁰ or where there were no attorneys and no fund except the individual liability.¹¹ The condition is performed by service on him who is in fact manager at the time.¹² The attorney under the power to contest claims has power to appeal.¹³ Proceedings supplementary to execution may not be maintained upon a judgment against the attorney in his representative capacity. The plaintiff should sue the underwriters.¹⁴ In

public policy. *Blair v. National Shirt & Overalls Co.*, 137 Ill. App. 413, 416.

¹⁰ *American Lucol Co. v. Blanchard*, 57 N. Y. S. 14, 26 Misc. 315.

¹¹ *American Lucol Co. v. Lowe*, 58 N. Y. S. 687, 690, 41 App. Div. 500; *Gilchrist v. Transp. Co.*, 21 Ohio Cir. Ct. Rep. 19; *Transp. Co. v. Gilchrist*, 24 Ohio Cir. Ct. Rep. 165, 167.

¹² The policy required notice to the attorney and named him. Before the loss the attorney had resigned, a new one had succeeded him and defendant underwriter had withdrawn from the Lloyds. Held: Notice to the attorney who succeeded is sufficient. Defendant's retirement did not affect his liability on the policy. *Walker v. Beecher*, 36 N. Y. S. 470, 15 Misc. 149.

Notice of loss to those actually attorneys at the time though not the ones named in the policy cannot be complained of by the underwriters. *Railli v. White*, 46 N. Y. S. 376, 20 Misc. 635.

Action was properly brought against one who in fact was the attorney at the time the policy was issued, though an old blank was used giving the name of a former attorney. *Wheelock v. Chapman*, 54 N. Y. S. 327, 34 App. Div. 464.

Judgment was recovered against the attorneys in fact on a Lloyds policy and the insured sought to collect from the individual underwriters. Defense that the power of attorney conferred a joint power on the three members of the firm and these policies were executed by only two members of the firm. Held: The true construction of the power gave a joint and several power to the attorneys. Hence the policies were well executed. *Unterberg v. Elder*, 134 N. Y. S. 242, 149 App. Div. 647.

¹³ *Lowrey v. Bates*, 56 N. Y. S. 197, 26 Misc. 407.

¹⁴ *Kriegman v. Dunphy*, 122 N. Y. S. 1116, 66 Misc. 221.

Under the code one action may be brought against all defendants

subsequent proceedings against the underwriters the plaintiff must show that execution issued on the judgment against the attorney and that no unexpended premiums or deposits were found.¹⁵ Satisfaction of the judgment against the attorney is a bar to an action against the underwriters even when by mistake the plaintiff has taken judgment against the attorney for only his share of the loss.¹⁶ In case of partial loss, each underwriter is liable for the face value of his share of the loss until it is satisfied and must protect himself by proceeding against the other underwriters for contribution.¹⁷ A clause in the policy commonly limits the aggregate liability of each underwriter on all policies.¹⁸

severally liable. *Isear v. Daynes*, 37 N. Y. S. 474; *Isear v. McMahon*, 37 N. Y. S. 1101, 16 Misc. 95.

Where the liability of each underwriter is expressly limited to a fraction of the whole amount and is several and not joint, an action cannot be brought against all the underwriters but should be brought against each separately. *Strauss v. Hoadley*, 48 N. Y. S. 239, 23 App. Div. 360.

¹⁵ *Lowrey v. Bates*, 56 N. Y. S. 197, 26 Misc. 407.

¹⁶ *M'Credy v. Thrush*, 56 N. Y. S. 68, 72, 37 App. Div. 465.

¹⁷ *McAllister v. Hoadley*, 76 Fed. 1000 (D. C. — N. Y.); *Sumner v. Piza*, 91 Fed. 677 (D. C. — N. Y.).

In the action against the individual underwriter, he is entitled to credit for his proportional share of any sum paid on account of the judgment against the attorney. *Cuff v. Heine*, 56 N. Y. S. 393, 26 Misc. 859.

¹⁸ A clause in a Lloyds policy limited the liability of individual underwriters "on all policies now or hereafter in force" after exhaustion of the premiums and deposits to twenty-five hundred dollars. In an action against an underwriter after judgment against the attorney, the defense was that he had paid out his \$2500 already. Held: Sufficient defense. The plaintiff is bound by his contract. "There is nothing more unreasonable in such a limitation than there is in any limitation an obligor may see fit to place upon any contract he may see fit to enter upon. There is certainly nothing more unreasonable in the limitation than there is in the limitation placed by law upon the individual liability of stockholders in ordinary fire insurance companies." *Burke v. Rhoads*, 79 N. Y. S. 407, 409, 39 Misc. 208.

The clause limiting the liability of each to an aggregate amount on all policies is a condition subsequent and the plaintiff need not aver that the amount has not yet been exhausted. *Enterprise Co. v. Mundy*, 62 N. J. Law 16, 42 Atl. 1063.

In Illinois it was held that the liabilities under one of these policies may be enforced by a bill in equity.¹⁹ There will probably be fewer of these cases in future because the statutes of New York, whence most of these policies came, now make this form of insurance impracticable.²⁰

§ 50. Underwriters of Securities

- Syndicates underwriting securities almost always recite in their agreement that nothing therein contained shall be construed as creating a partnership between them. The courts, however, have sometimes held such syndicates to be partnerships.¹ More often, however,

¹⁹ Equity has jurisdiction of a suit against the manager of a Lloyds association to enforce a policy because the remedy of equity is more flexible and it may become necessary to compel the manager to collect the fund from the underwriters out of which this policy is to be paid. The jurisdiction is concurrent, however, for the plaintiff might have brought an action at law under the terms of the agreement of association against the manager. The agreement is set forth at length on pages 489 *et seq.* It provides that the manager shall "appear for the subscribers in case of any proceedings at law being taken against them in connection with any policy and in their name defend, compromise or settle the same." If this clause did not appear plaintiff could proceed in equity joining a few to represent all. There was no provision for meetings but the subscribers voted by mail for an advisory committee of subscribers to supervise the conduct of the business by the manager who was appointed by separate powers of attorney. The court refers to it several times as an association. Notice by a subscriber of intention to withdraw would not terminate unexpired policies. *Warfield-Howell Co. v. Williamson*, 233 Ill. 487, 495, 84 N. E. 706.

²⁰ By § 54 of the Insurance Law of New York associations are forbidden to do business under any name except the true name of the persons comprising the association. They must also have capital and make deposits with the State officials like corporations. By Chap. 684 of Laws of 1894 this was made inapplicable to Lloyds doing business 1 Oct. 1892.

Defendants in a proceeding to prevent transaction of business by the "People's Lloyds" claimed to be assignees of members of such an association in existence 1 Oct. 1892 and therefore not prohibited. Held: That original organization was for the purpose of sale and was not engaged in business in fact at the time alleged. *People v. Loew*, 52 N. Y. S. 799, 23 Misc. 574.

¹ See § 8.

they have not had to pass upon the question but have been able to decide the issue between them by applying the rules of agency,² for most of the litigation appears

² A syndicate promoting a real estate speculation with a view to incorporation. The holder of the option made a secret profit for which the rest sue. Held: "We think it is recognized by the decisions in Illinois as elsewhere that syndicate or association subscriptions to purchase land or interests in land or perhaps any other purchasable commodity establish if not a partnership at least such fiduciary relations between the associates as impose a trust character on funds confided by the others to the purchasing agent and entitle them to ask in equity an accounting and the restoration of money improperly diverted from its intended purpose." *Maxwell v. McWilliams*, 145 Ill. App. 155, 176.

X got up a syndicate of ten to buy some land on mortgage. In fact X was agent of vendor and was making a secret profit. Also at last moment one of the original syndicate refused to sign the contract of purchase and X substituted another unknown to the other eight. Held: Vendor cannot enforce the contract against other members of syndicate. "These parties not only contracted with the plaintiff but, by implication of law, contracted with one another. They had chosen their associates with whom they agreed to contract. No authority is recognized by the law under which the parties may be changed without the assent of the associates." "The contract as it appears with the substituted associate is not the contract in which the minds of the other associates met. It is void and cannot be enforced" (p. 223). Also because of the secret profit of plaintiff's agent (p. 224). *Crittenden v. Armour*, 80 Ia. 221, 45 N. W. 888.

A syndicate was formed to acquire securities of certain corporations. A treasurer was appointed to negotiate notes of the syndicate and handle its funds. He made a construction contract on behalf of the syndicate that involved liabilities far in excess of those contemplated by the original agreement. A member protested and withdrew and the deal went through without him, without formal reorganization, and made large profits. He now claims his share. Held: The construction contract was rightly excluded. "As before shown, there was no evidence that I. C. Libby was ever expressly authorized to execute the construction contract on behalf of the syndicate and he obviously had no greater power than that possessed by every other member of the syndicate. If the syndicate is to be termed a co-partnership, it must be considered that it was only a special partnership with its scope and purpose explicitly defined and limited." Hence he had no implied authority. *Merrill v. Milliken*, 101 Me. 50, 56, 63 Atl. 299.

Plaintiff brought an action at law on a contract under which plaintiff acquired certain property for the Little Kanawha Syndicate. The defendants were the syndicate managers. The court below held the defendants were not liable because they acted as agents for a known principal. The court above Held: The complaint alleged a contract in which the agents expressly bound themselves personally, and so would be liable. Even if the complaint is not to be so construed, the agents would

to have arisen between the syndicate managers or agents and its members. In an important recent case where a

be liable on the theory that they exceeded their authority, for the syndicate agreement stipulates that each subscriber shall be liable only to the syndicate managers and then only to the amount of his subscription. If the members of the syndicate are liable as partners, then the defendants as members are also liable, and not having pleaded in abatement the non-joinder of the other partners cannot raise that defense now. *Jones v. Gould*, 200 N. Y. 18, 20, 72 N. E. 1071. See *Jones v. Gould*, 209 N. Y. 419, 103 N. E. 720.

A syndicate was formed to float an independent telephone franchise in New York City involving the securities of several corporations. Finally a voting trust and later a holding company was formed to carry some of these securities. In the prospectus of the holding company were false representations for which action was brought. The issue was whether the holding company or the syndicate were liable. Held: "Those members of the syndicate who authorized the appointment of the managers who issued the prospectus and those members of the syndicate who, coming into the syndicate after the managers were appointed, approved of the action which had already been taken concerning such appointment are liable for any fraud committed by those managers in thus offering the property of the syndicate for sale." "The burden of proving agency rested upon the plaintiff in the first instance; but when the plaintiff proved that the managers had been appointed and acted as such throughout the entire life of the syndicate, the inference would seem to be a fair one that those joining the syndicate subsequent to the appointment knew who the managers were unless the contrary was shown." *Lane v. Fenn*, 120 N. Y. S. 237, 255, 256, 65 Misc. 336. See *Hornblower v. Crandall*, 7 Mo. App. 220, aff'd 78 Mo. 581.

A syndicate agreement to underwrite stock provided that the manager should borrow on the security of the stock "in behalf of the subscribers severally in proportion to their subscriptions and by delivery of the agreement as evidencing the subscribers' several guarantees of repayment of the loan." Also provided that only the manager could sue on the agreement. He borrowed of plaintiff who now sues an underwriter for the balance of his subscription to apply on the unpaid balance of the loan. Held: Action maintainable on several grounds. (1) Reading the two contracts as one, there was a guaranty of payment that ran to plaintiff. (2) Manager had authority to bind defendant by his agreement. (3) Though the agreement says the right of action is vested solely in the manager, he could assign it to plaintiff. *Union Trust Co. v. Van Schaick*, 141 N. Y. S. 955, 156 App. Div. 769.

An underwriting agreement authorized the manager of the syndicate to pledge the underwriting agreement and execute a guaranty. Held: This could be done only by all the managers as individuals and not in firm name (managers were partners). *Union Land Co. v. Gwynn*, 144 N. Y. S. 110, 121, 158 App. Div. 829.

A subscriber to a syndicate for the reorganization of a corporation

creditor sought to hold as a partner one of the managers of a syndicate on a contract by another, the court discussed the relations of managers and subscribers. The defendants were managers of a syndicate formed to buy one railroad, build another and buy lands alongside. By the agreement the managers were to do all acts necessary for that purpose and "to absolutely control the property so to be constructed or purchased as fully in all respects as if they were the absolute owners thereof." On sale of the properties the managers were to divide the cash or securities *pro rata* among the subscribers "from time to time in their discretion." Nothing therein was "to constitute the syndicate subscribers partners with the syndicate managers or as to each other." In an action against the managers on a contract made by one of them it was held that the relation between the managers and subscribers (though fiduciary) was not that of principal and agent. The managers themselves were principals in any contract they might make. The managers and subscribers were not partners, for the subscribers had no right in the properties acquired except to a share on winding up. Hence the defendants could not set up that they were partners.

brought a bill against the syndicate managers for rescission after the reorganization was completed and tendered back his shares in the new corporation on the ground that the managers failed to disclose their interest in the transaction as owners of some of the stock of the original company. Held: The bill stated a cause of action. *Heckscher v. Edenborn*, 203 N. Y. 210, 96 N. E. 441. In another case arising out of the same transaction the Federal Court held that the remedy, if any, was in the corporation. The plaintiff cannot restore the *status quo*. *Edenborn v. Sim*, 206 Fed. 275 (C. C. A. — N. Y.).

A trust company that held the securities for the managers was not trustee for the subscribers to the syndicate agreement but a mere depositor or agent for the managers. Agreement construed to authorize managers to extend the time within which it was to be carried out and that obtaining consent of subscribers was a precautionary measure only. *Kelly v. Illinois State Trust Co.*, 215 Fed. 567, 572 (C. C. A. — Ill.).

“The work which the defendants undertook to carry out was not the prosecution of any general business but was limited to a single enterprise. . . . This was not strictly a partnership though it had many of the features of such a relation. It was what is now generally known as a joint venture rather than a commercial partnership. The authorities in some of the States hold that in the prosecution of the venture each party has the same full power to bind his associates in any contract in regard to the venture that an ordinary commercial partner would have. We are not now inclined to hold that doctrine in its full integrity, but such ruling is not necessary to the case.” There was express authority from the other defendants to the one making the contract.³

The conclusion of the court that they were not partners, it is submitted was correct. The endorsement given to the use of the term joint venture or joint adventure as describing a relation distinct from partnership existing for the purpose of a single enterprise has, however, little to commend it.⁴ If the term is meant to describe the relation of groups of independent contractors called herein “unassociated groups,” it may, if confined in future to cases of that class, prove more acceptable than the title here suggested, though the latter seems more characteristic. It is possible, however, that the relation which the court had in mind was really that of trust. The statement that “the managers themselves were principals in any contract which they might make” suggests it. Indeed, in carefully drawn underwriting agreements the managers, though not so described, are

³ *Jones v. Gould*, 209 N. Y. 419, 424, 426, 103 N. E. 720. See also *Jones v. Gould*, 200 N. Y. 18, 92 N. E. 1071.

⁴ See § 3.

really trustees for the subscribers. It seems likely that as these organizations come more frequently before the courts, the problems they give rise to will be easily solved by the principles of the law of trusts and that they will be classified with the cases included in chapter III.

Analogous to these formal syndicates are occasional cases relating to those extreme productions of the speculative mania popularly called "pools" or "blind pools." These are usually most informal arrangements whereby a group of individuals entrust their money to some person to be used for some highly speculative enterprise. In one of these cases the court described the relation as a *quasi* partnership.

A promoter interested B in some copper mines. B neglected to investigate carefully but decided to buy the property and incorporate the enterprise. He allowed some of his friends to come into the enterprise and they subscribed \$250,000 without knowing anything about the details of the proposition. B gave receipts as follows: "Subscription of \$— to an underwriting syndicate for the flotation of certain copper properties in Arizona and New Mexico." The money was used by B to buy the property, which he conveyed to certain corporations the stock of which was owned by a holding company. The stock was so watered that it could not be sold on the market and B distributed it to the subscribers. A bill in equity by a subscriber against B for rescission of the contract and an accounting was dismissed because no fraud, only negligence was shown.

In the opinion the court said: "In the general management of the business, until the time came for deter-

mining how many shares of the stock and what part of the property the subscribers were entitled to receive, Burrage was not acting in matters in which he had a personal interest adverse to the subscribers, in such a way as to subject him to the strict rule which applies to those acting for themselves in the business of others to whom they stand in a fiduciary relation. In a sense he was acting as their agent and trustee in matters in which he and they had a common interest. They were *quasi* partners with him in the enterprise, and his relation to them was analogous to that of a partner to his co-partner. It is not suggested that his advances to the Arimex Company by way of loans were not made in good faith, with a view to the best interests of the corporation."

It is not to be believed, however, that the court by the words *quasi* partnership intended to describe a new form of partnership, but rather to say that the fiduciary obligation existing between partners also exists between the men who manage the affairs of the pool and the other contributors. This, of course, is nothing more than an application of the principles of agency.⁵ The word "pool" has acquired no definite meaning except so far as it connotes an irresponsible gambling instinct. In many cases it will be found that the arrangement has all the elements of a partnership⁶ or of a trust. In

⁵ *Runkle v. Burrage*, 202 Mass. 89, 88 N. E. 573.

⁶ Plaintiff and defendant formed a pool to speculate in stock in a corporation. Plaintiff was to have the profit on two hundred and fifty shares and if the stock sold above a certain price was to share equally with the other in the excess profit on all the shares. Later the scheme was changed and the plaintiff was induced to agree to a new bonus on which he got less. Held: He was induced to assent to the ratification by false representations of fact. Whether the relation of plaintiff and defendants was a technical partnership or a joint adventure is immaterial. The legal rules that apply to such an agreement are precisely the

some cases it appears only as a relation of debtor and creditor between the manager of the pool and his victims.

In bankruptcy proceedings against an individual trading under the name of Minnesota Grain and Indemnity Company, certain creditors showed that he had issued to them certificates entitling them to share in a pool which he had formed for speculation in wheat. The court did not have to decide whether the contract was illegal as a gambling contract or not. As to the relations of the certificate holders, the court said:

“To the other claimants mentioned in said order three kinds of certificates and only three were issued by Norris. In the great majority of cases the certificates stated that Norris had received a sum of money therein mentioned in full payment for a number of shares therein stated in the pool of the Minnesota Grain and Indemnity Company, in which name Norris was then doing business. By the terms of that certificate the company agreed to invest this money according to its judgment and to pay the certificate holder on the first of any month his *pro rata* share of the profits on hand at that time. The holder could draw the whole or any part of his money on the first of any month by giving ten days’ notice of his intention so to do, and the company could cancel the certificate on the first day of January, 1910, or on the first day of any January after, by giving thirty days’ notice.

“By the second form of contract the Indemnity Co., that is, Norris, agreed to pay a dividend of \$2.50 a share on each and every hundred dollars of profit, pay-

same as those that apply to a technical partnership. The relation is fiduciary and requires the utmost good faith. Dissent on fact of false representation. *Spier v. Hyde*, 87 N. Y. S. 285, 288, 92 App. Div. 467.

able on the first of each month. This also provided that an investment could be withdrawn on the first of any month by giving ten days' notice. It made no provision for repayment by the company.

"The third form of certificate was similar to the second except that it did not contain the word 'pool.'

"The relation created by each of these certificates between the parties was that of lender and borrower. There is nothing in them to support the contention that the relation was that of partners. The word 'pool' is entirely insufficient for that purpose. The person paying the money had the right to withdraw it at any time. Norris had the right to return it at stated intervals. The fact that dividends were paid from the profits indicated only that such was the method adopted for paying interest on the money loaned."⁷ In most instances, however, the "pool" will probably be found to be a collection of independent contracts with a common agent.⁸

⁷ *In re Norris*, 190 Fed. 101, 102 (D. C. — Minn.).

⁸ Action by managers of a pool to buy and sell stock in a mining company against a member of the pool for the price of his share of the stock left in the pool. The written agreement provided that if any member failed to take up his share of the stock at the request of the managers, they could sell it for his account and that the pool should continue for three months. The last purchase was in 1903, and this action was brought in 1908. Held: The action is upon a written instrument and the six-year statute of limitations applies. The action was brought in time. The stipulation about sale of shares on default was inserted for the benefit of the managers. They were under no duty to sell if the defendant did not instruct them to. They could continue the defendant as a member of the pool and still hold him for the price of the stock. *McMillan v. Whitley*, 38 Utah 452, 113 Pac. 1026, 1028. See *Hoare v. Dawes*, 1 Douglass 371, and see § 53.

An example of informal "pool certificates," so called, appears in *Smith v. Kinney*, 143 Pac. 901, 1126 (Ore.).

An underwriting agreement to buy bonds if the manager to whom the covenants ran did not sell them. It is no defense that they turned out to be worthless. The contract was assignable. The contract was not an agreement to loan money to the corporation but to insure the sale of the bonds. *Busch v. Stromberg Co.*, 217 Fed. 328, 331, 333 (C. C. A.—Mo.).

§ 51. Unsuccessful Incorporators

In some States those who attempt to form a corporation and who so far fail that they do not effect even a *de facto* corporation are held not to be partners.¹ Since they have organized for the purpose of doing business for profit, however, and since they are clearly associated in precisely the same manner in which they would have been associated if they had been a corporation, it seems difficult to justify the decisions which relieve the shareholders from the liabilities of partners. The argument that they should not be held liable because they did not intend to assume the liability of partners is not conclusive, because it has always been held that while partnership is a relation which must be intended, the intent is to be inferred from the man's acts and not from his declarations, and that if the facts show that he intentionally assumed a relation to which the law ordinarily attaches the obligations of partners, the fact that he also intended not to be personally liable for the debts of the organization or expressly declared that he was not to be considered a partner will not be sufficient to prevent the organization from being a partnership. If unincorporated associations are ever fully recognized by the courts as in a class intermediate between partnership and corporation those who attempt to incorporate and wholly fail may properly be included in that new classification. In the present state of the law, however, since they clearly do not belong among the non-profit associations, in States where it is held that these groups are not partnerships, they must be treated as an unassociated group.

¹ *Fay v. Noble*, 7 Cush. 189; *Ward v. Brigham*, 127 Mass. 24.

§ 52. Tenants in Common

Tenants in common of property as well as joint tenants may be numerous and may contract jointly with others without necessarily becoming thereby partners in a business enterprise.¹ The title to the personal property of a firm at common law vests in the firm as an entity, but title to real estate vests in the individual partners as joint tenants or tenants in common, so that the law of partnership is intimately connected with that of the subject of this section. Moreover, tenants in common sometimes change their relation into that of partners, in which case they may or may not contribute the common property as capital of the partnership. It is frequently a difficult question of fact to determine whether or not joint owners have become partners.² Ships are often built by contributions from a large number who take shares in the ship. In the absence of further agreement creating a partnership these owners are merely tenants in common.³ In some cases an element of association was involved, but as the trading element in the business was lacking they were held not partnerships.⁴ Numerous parties may be ten-

¹ A subscription agreement to "take stock" in a hotel running to the promoter on which he agreed to pay seven per cent. was held to contemplate that the shares should represent an interest in the real estate on which in lieu of rent the promoter agreed to pay interest. *Near v. Donnelly*, 80 Mich. 130, 136, 44 N. W. 1118.

² See § 17.

³ *Thorndike v. De Wolf*, 6 Pick. 120; *French v. Price*, 24 Pick. 13; *Mitchell v. Chambers*, 43 Mich. 150, 5 N. W. 57; *Munsford v. Nicholl*, 20 Johns. 611 (N. Y.).

⁴ Owners of separate parts of a mining irrigation ditch joined an association and recorded the articles subject to amendment by a two-thirds vote. No provision for withdrawal of members or dissolution. Certain members formally withdrew while still owning their part of the ditch and refused to pay share of expenses of upkeep as assumed by the association. The other tenants in common proceeded under a statute

ants in common of grain in an elevator before division has actually been made.⁵

By statute in most States, a conveyance not expressly describing the grantees as joint tenants will create a tenancy in common. This is to avoid a characteristic of joint tenancy which is its chief distinction from tenancy in common, viz., the vesting of title in the survivors on the death of one owner. Though there are some other distinctions between the two kinds of ownership inherited from the mediaeval law of real property they are of slight consequence in modern business transactions. One common characteristic of both forms of tenancy is that the interest of the owner is an undi-

to enforce a lien for such disbursements. Held: Not intended by the articles that a member could withdraw. It differs from a commercial partnership or a joint stock company. The association can only be dissolved by two-thirds of the shares or for good cause shown. *Strang v. Osborne*, 42 Col. 187, 94 Pac. 320.

Land was bought by subscription, the contracts providing that the lots should be divided among the subscribers in such way as the majority should decide. Held: The transactions at the meetings of the subscribers can be proved by parol. It was but a temporary association. The fact that the secretary left some memoranda of their doings is immaterial. Though each subscriber signed a separate contract, they were identical and are to be construed as one. Under it the majority were constituted their agents to divide the lots. Selling the preference of choice of lots at auction was within their power and bound the defendant though he did not attend the meeting when it was adopted. His presence was not necessary to validate the act of his agent. *Morey v. Clopton*, 103 Mo. App. 368, 379, 77 S. W. 467.

A number of mill owners associated themselves by agreement to construct a reservoir. Their ownership was represented by shares and under the terms of the contract a majority of shares was to decide questions as to the flow of the water for use of the shareholders. Defendants own majority of shares and do not want to pay to keep up the reservoir, as they own no mills. They let the water run to waste unless plaintiff will pay for it. Suit for injunction. Held: Shareholders are tenants in common owning undivided shares. In exceptional cases like this the court will interfere to prevent waste by a tenant in common. Under the contract the right to regulate is for use, not for waste. Injunction granted. *Ballou v. Wood*, 8 Cush. 48, 51.

⁵ Tenants in common of grain in elevator. *Sexton v. Graham*, 53 Ia. 181, 4 N. W. 1090; *Cushing v. Breed*, 14 Allen 376.

vided share in the whole of the property, which share is freely transferable, though upon transfer by a joint tenant his grantee becomes thereby only a tenant in common with the others.⁶ All are equally entitled to the possession of the common property and the courts will not disturb the possession of one owner on the petition of the others unless on a bill in equity it appears that there is danger of irreparable injury to the property or its removal from the jurisdiction.⁷ One co-owner has no implied authority to sell the share of the others.⁸ There are difficulties about actions at law between co-owners for conversion by detaining merely,⁹ but for destruction of the property,¹⁰ or sale of the interest of the others,¹¹ an action of tort will lie. "In general equity will not interfere between tenants in common to restrain waste, on the ground that one tenant in common has a right to enjoy as he pleases, and that the party complaining may relieve himself at law by having partition, and the court will not act against the legal title in possession of a tenant in common. The court will, however, restrain a tenant in common in some special cases of waste and under peculiar circumstances,"¹² and will enjoin obstruction

⁶ *Messing v. Messing*, 71 N. Y. S. 717, 64 App. Div. 125; *Denne v. Judge*, 11 East 288.

⁷ *Allen v. Harper*, 26 Ala. 686; *Southworth v. Smith*, 27 Conn. 355; *Conover v. Earl*, 26 Ia. 167; *Swartwout v. Evans*, 37 Ill. 442.

⁸ *Goell v. Morse*, 126 Mass. 480; *Perry v. Granger*, 21 Neb. 579, 33 N. W. 261 (vessel); *Henshaw v. Clark*, 2 Root. 103. The sale may be ratified by the co-owners. *Putnam v. Wise*, 1 Hill 234.

⁹ *Hyde v. Stone*, 9 Cow. 230 (N. Y.); *Hurd v. Darling*, 14 Vt. 214.

¹⁰ *Redington v. Chase*, 44 N. H. 36 (melting iron with other iron).

¹¹ *Goell v. Morse*, 126 Mass. 480 (horse); *Weld v. Oliver*, 21 Pick. 559 (vessel); *Hyde v. Stone*, 7 Wend. 354 (vessel).

¹² Such as acts which if continued would amount to a destruction of the property. A majority of an association owning a reservoir restrained from letting the water go to waste without regard to the interests of the minority. *Ballou v. Wood*, 8 Cush. 48, 52.

by one tenant of the enjoyment of the common property by another.¹³ The cases are in conflict as to whether a tenant in common owes a fiduciary obligation to his co-tenants.¹⁴ Most courts hold that if he buys in an encumbrance on the common property he must hold it subject to the right of his co-tenants to share in the benefit of it on payment of their respective shares in the cost.¹⁵ On the other hand it has been held that he

¹³ One member of a farmer's telephone line permitted an outsider to use it too much and the rest cut off his connection. He sued for injunction. Held: Injunction granted. They were not partners because they did not contemplate profit or a mutual agency of the members. But tenant in common has right to injunction against obstruction of his enjoyment of the common property. If they were not tenants in common, their rights were analogous to it. They have their remedy for the excessive use by plaintiff, but not by destruction of the property. *Hancock v. Thorpe*, 129 Ga. 812, 60 S. E. 168.

¹⁴ Syndicate lands were sold at auction by holders of liens on them and two groups of shareholders bid. Defendant bought on a secret agreement to share with certain other shareholders, excluding the plaintiff. Several years later when the value had greatly increased the plaintiff brought this bill to establish a trust for his benefit on the ground that whether tenants in common or partners their relation was fiduciary and defendant could not bid in for himself and exclude the plaintiff. The court in a loosely reasoned decision found that even if there was a fiduciary obligation, it was not violated and plaintiff sued too late. *Starkweather v. Jenner*, 27 App. D. C. 348, 361.

Plaintiff organized an association to buy land. He did not disclose that he was to get a commission on the sale. The purchase was made, but later the land was returned and some of the consideration recovered. On dividing it they discovered the plaintiff's commission and deducted that amount from his share. He sued to recover it. Held: Plaintiff cannot recover. Whether their relation was that of partners or joint adventurers the fiduciary obligation of the members to each other was the same and the plaintiff was not entitled to a secret profit. *Church v. Odell*, 100 Minn. 98, 110 N. W. 346.

Tenants in common of a lode who had formerly been mining partners sold out. Held: "There is no relation of trust or confidence between tenants in common who had been partners in the development of lode mining claims which prevents one of them from demanding and receiving a higher sum for his interest in the property than is paid therefor to his co-owners." *Harris v. Lloyd*, 11 Mont. 390, 405, 28 Pac. 736.

¹⁵ *Rockwell v. Dewees*, 2 Black. 613; *Hurley v. Hurley*, 148 Mass. 444, 19 N. E. 545; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Lloyd v. Lynch*, 28 Pa. St. 419; *Downer v. Smith*, 38 Vt. 464. See *Barnes v.*

is under no fiduciary obligation to his co-tenants in buying of them their shares in the common property. The rule is laid down by Chief Justice Shaw in a Massachusetts case as follows:

“The court are of opinion that the tenants in common of a vessel, who are not engaged jointly in the employment of purchasing or building vessels for sale, do not stand in such a relation of mutual trust and confidence towards each other in respect to the sale of such vessel that each is bound in his dealings with the other to communicate all the information of facts within his knowledge which may affect the price or value. A different rule may prevail in respect to any contract for the use or employment of the common property in which relation perhaps they may be deemed to place confidence mutually in each other. But in common cases of tenants in common of a vessel they are independent of each other in all matters of purchase and sale and may deal with each other in the same manner as owners of separate property. Each may act upon the knowledge which he has without communicating it. But *aliud est tacere, aliud celare*. With this advantageous knowledge, if there be studied efforts to prevent the other from coming to the knowledge of the truth, or if there be any through slight, false and fraudulent suggestion or representation, then the transaction is tainted with turpitude and alike contrary to the rules of morality and law.”¹⁶

Tenants in common of a mine who did not become partners in working it were held entitled nevertheless

Boardman, 152 Mass. 391, 25 N. E. 623; *Turner v. Sawyer*, 150 U. S. 578, 37 L. ed. 1189, 14 S. Ct. 192; *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334.

¹⁶ *Matthews v. Bliss*, 22 Pick. 48, 52.

to an accounting.¹⁷ In some States a tenant in common may proceed in equity to compel his co-tenant to contribute to necessary repairs.¹⁸ Though tenants in common of personalty at common law have no right to partition, a court of equity will enforce appropriate relief.¹⁹ If the property is severable in its nature, each tenant may appropriate his own share.²⁰ A majority in value of the tenants in common of a vessel may control the employment of it, but a court of admiralty will require them to give security for its return to a dissenting minority.²¹ It has been held that where the interests of disputing owners are equal and a controversy as to the use of the ship has been decided, a court of admiralty will order a sale of the share of the owner who is defeated.²² There are numerous cases holding that one part owner of a ship has power to bind his co-owners in contract for necessary repairs and supplies, but it would seem that in all of those cases the owners were really partners.

§ 53. Common Agents

There are occasional cases of groups dealing through a common agent which are not properly partnerships,

¹⁷ *Kahn v. Smelting Co.*, 102 U. S. 641, 646, 26 L. ed. 266; *Howard v. Luce*, 171 Fed. 584 (C. C. — N. Y.).

¹⁸ *Alexander v. Ellison*, 79 Ky. 148; *Stevens v. Thompson*, 17 N. H. 103; *Taylor v. Baldwin*, 10 Barb. 582 (N. Y.); *Munford v. Brown*, 6 Cow. 475 (N. Y.); *Beaty v. Bordwell*, 91 Pa. St. 411; *Farrand v. Gleason*, 56 Vt. 633; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. 746; *McDearman v. McClure*, 31 Ark. 559.

An action on the case for damages for failure to repair was denied. It was said the remedy was by partition. *Calvert v. Aldrich*, 99 Mass. 74, 79; *Leigh v. Dickeson*, 15 Q. B. D. 60.

¹⁹ *Willard v. Willard*, 145 U. S. 116, 36 L. ed. 644, 12 S. Ct. 818; *Godfrey v. White*, 60 Mich. 443, 27 N. W. 593; *Barney v. Leach*, 54 N. H. 128; *Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. 809.

²⁰ *Fobes v. Shattuck*, 22 Barb. 568.

²¹ *The Orleans v. Phoebus*, 11 Pet. 178; *The Apollo*, 1 Hagg. 311.

²² *The Annie H. Smith*, 10 Ben. 110; *Coyne v. Caples*, 7 Sawyer 360.

but which do not fall in any of the foregoing classifications. In one early case a number of men entered into a speculation in tea. They all employed a certain broker to buy a lot of tea at a sale of the East India Company, the lots being in general too large for any one dealer. The broker issued warrants similar to warehouse receipts for the proportionate share of each in the tea and pledged these warrants with the plaintiff as security for a loan to carry the tea until it could be sold. The price of tea dropped, and the broker became bankrupt, as did others to whom the warrants had been issued. The bankers sued the defendants for the whole balance of the loan as partners with the others. The defendants had paid the broker the full amount for their share of the tea and it appeared that there had been no joint arrangement about the resale of the tea. There was a verdict for the defendant and a motion for a new trial was refused.¹

¹ Hoare v. Dawes, 1 Douglass 371.

A stock pool was organized with certain brokers as agents who were to buy the stock and pay for it and then deliver it to members who were to pay for their shares. *Vice versa* on sales. When agent and one member failed the same day and the agent was unable to take stock it had bought but made no demand on the members, the receiver of the insolvent member was not liable to the trustee in bankruptcy of the agent for his share either of the purchase price or of the loss on resale by the vendors. *Re Lathrop Haskins & Co.*, 216 Fed. 102, 106 (C. C. A. — N. Y.).

CHAPTER V

NON-PROFIT ASSOCIATIONS

§ 54. Definition

THE kinds of association considered in this chapter are very different in their legal status from those we have previously discussed. Their underlying principles are derived from the law of agency and not from the law of partnership. Yet they are true associations and cannot properly be classified with the trusts and the joint contractual relations already considered. Because they are true associations and frequently have to do with commercial rather than social affairs it is not always easy to distinguish them from partnerships. An illustration of this is the stock exchange, a mighty factor in big business. Its members are actively engaged in business for profit under the auspices of the exchange, but it is their individual business and not that of the association. As was said in a leading case, "the exchange is not a partnership and the plaintiff is not entitled to the equitable remedies of partners. It is not a union of persons joining together property, labor or skill for their common benefit in any pursuit or business having a communion of profit and loss and distinguishable by the feature that if earned there is to be a division of gains. It may be described as an association of persons engaged in the same line of business who have organized together for the purpose of establishing certain rules by which each agrees to be governed in the conduct and management of his sepa-

rate transactions or business; which is not a partnership.”¹ At the other extreme is the social club² with its constitution and by-laws, — a simple association that affords few problems for the lawyer, and yet occasionally appears in the reports, usually in bitter contests over membership. No one ever contends that these associations are partnerships. Intermediate between them come religious societies,³ fraternal or-

¹ *White v. Brownell*, 2 Daly 329 (N. Y.).

² *Richmond v. Judy*, 6 Mo. App. 465, 468.

“Unincorporated societies have long held in this State an intermediate position between corporations and partnerships.” *Liederkrantz Society v. Germania Turn-Verein*, 163 Pa. St. 265, 268, 29 Atl. 918.

³ *Kerr v. Hicks*, 154 N. C. 267, 268, 70 S. E. 468 (convention of churches); *Queen v. Robson*, 16 Q. B. D. 137 (Y. M. C. A.).

See a curious dictum that members of an unincorporated church are liable on its contracts as joint promissors or partners. *Thurmond v. Cedar Church*, 110 Ga. 816, 36 S. E. 221.

Plaintiff joined a religious community called Koreshan Unity and contributed her property to the common fund, receiving for it a note signed by the leader of the flock and his assistant “for the Koreshan Unity.” She was to enforce this whenever she decided to leave the community. Held: An action on the note against members of the colony as partners cannot be maintained. If it was a partnership, it was not a trading firm and there was no implied authority to issue notes. It was not a partnership because not carried on for business purposes, but for religious and social purposes. It was more like a tenancy in common or club. There was no evidence of authorization or ratification by the other members. *Teed v. Parsons*, 202 Ill. 455, 460, 66 N. E. 1044.

In Massachusetts before the Revolution and for some time after religious societies or parishes were corporations, at first identical with the towns themselves, and for a long time even after the Revolution regulated by statute like towns. Within this corporation, called the “society,” was an unincorporated association called the “church,” which partook of the Lord’s Supper and performed other religious rites to which other members of the society were not admitted. *Weld v. May*, 9 Cush. 181, 184. As a curious exception to the law of corporations an execution against a town or territorial parish in Massachusetts could be levied on the property of individual members thereof. *Chase v. Prendergast*, 19 Pick. 564. The law was amended to permit the formation of poll parishes not on a territorial basis. These were at first corporations but might also be unincorporated associations, which, in the absence of any restriction in their articles of association, had full power to regulate by by-law the terms of their membership. *Taylor v. Edson*, 4 Cush. 522, 526.

Information against officers of the Hollis Street Church to determine the right in funds derived from contributions and other donations not specifically appropriated and accumulations of interest. The church

ders,⁴ mutual benefit societies⁵ with and without insur-

of which they were officers was a voluntary association connected with the religious society, which was a corporation. "It may be a question, then, how such a voluntary association can act, subsist, and enjoy rights and privileges; or, in other words, how its certainty, identity, and perpetuity can be known and established. The answer is, that it subsists and acts, and possesses these qualities, because it is incident to, and inseparably connected with, and dependent on, a body, which has certainty, identity, and perpetual succession by an act of incorporation. The identity of a church is determined by the identity of the incorporated religious society within which it is gathered; and such church, although a merely voluntary association, has perpetuity through its connection with a corporation which has perpetual succession. If, therefore, all the members of a church should die, or withdraw, any number of the members of the same society, forming themselves into church order, for the celebration of the ordinances, either by the spontaneous movement of such members themselves, or under the advice, and at the call of neighboring churches, such association would be the church of the society, identical with the church formerly subsisting; and upon the orderly choice of deacons, they would be competent to take and hold property given to the church, and would be the regular successors of any former deacons; and if need be, might maintain suits for the recovery of any such property." This capacity to take in succession was given by statute in 1754. It was not necessary to give effect to a grant to a deacon of a church, if he was living at the death of the testator, because he would then take in his personal capacity and on his death it would descend to his heirs, but the statute was necessary in order that it might pass to his successor in office; that is, the deacons were really made a corporation with perpetual succession for that purpose, although the members of the church were not a corporation. The members of the church were the beneficiaries. This bill was dismissed, however, because it did not appear to be brought at the instance of the church or a majority of its male members, but at the relation of one member only, which is insufficient in the case of a private charity. *Parker v. May*, 5 Cush. 336, 345.

The connection of a congregation with its church corporation may be severed without loss of identity. *Holt v. Downs*, 58 N. H. 170, 172. Many churches in Massachusetts are now unincorporated. An unincorporated religious society in Massachusetts could acquire title to real estate by disseisin because since 1811 such associations had been given by statute for the purpose of taking, holding and transmitting property, all the attributes of a corporation. *First Church v. Harper*, 191 Mass. 196, 207, 77 N. E. 778.

In the other New England States and New York, New Jersey and South Carolina churches are usually incorporated. In the remaining States they are more often unincorporated. Since 1731 in Pennsylvania religious associations have been recognized as having associate and *quasi* corporate existence at law. *Phipps v. Jones*, 20 Pa. 260, 263.

⁴ Held: Not partnerships. *Ferris v. Thaw*, 5 Mo. App. 279, 286. *Ash v. Guie*, 97 Pa. St. 493, 498.

⁵ Not partnership. *Burke v. Roper*, 79 Ala. 138, 142; *Laford v.*

ance features, professional organizations and temporary public organizations,⁶ which are plainly not partnerships, and the socialistic communities,⁷ "farmer's telephone lines,"⁸ trade unions,⁹ and employers' associa-

Deems, 81 N. Y. 507, 514; *Robertson v. Walker*, 3 Baxt. (Tenn.) 316, 318.

The contract right of members is not an insurance contract, but in a sense they are beneficiaries of a trust. *Piries v. First Russian Soc.*, 83 N. J. Eq. 29, 89 Atl. 1036.

"A mutual benefit association partakes of the nature of a partnership." *Gorman v. Russell*, 14 Cal. 531, 539.

In one case the court talked as though an insurance order was a partnership, though with limited liability. *Hammerstein v. Parsons*, 38 Mo. App. 332, 335.

Mutual benefit societies have a twofold character—social organization, mutual insurance company. Members to whom benefit certificates are issued acquire property rights, in dealing with which it is important that courts confine themselves strictly to the terms of the contract the members have made for themselves. *Mulroy v. Supreme Lodge, K. H.*, 28 Mo. App. 463, 471.

Mitchell, J.: "We agree with counsel for defendant that the 'fluid' state, as he terms it, is the condition of many of these benefit and fraternal associations. Their organization as well as manner of doing business is usually so informal that it has been the plague of the courts to define their character and construe their contracts." *Cornfield v. Order Brith Abraham*, 64 Minn. 261, 263, 66 N. W. 970.

A mutual insurance society in which each in consideration of a payment made to him underwrites a policy for a stipulated sum is not a partnership. *Strong v. Harvey*, 3 Bing. 304; *Redway v. Sweet*, L. T. 2 Ex. 400; *Gray v. Pearson*, L. R. 5 C. P. 568; *Andrew's and Alexander's Case*, 8 Eq. 176.

⁶ *Ostrom v. Greene*, 161 N. Y. 353, 360, 55 N. E. 919 (informal association without rules to raise money to build a monument).

⁷ Referred to as a partnership. *Goesele v. Bimeler*, 14 How. 589, 607.

⁸ *Moore v. Telephone Co.*, 171 Mich. 388, 399, 137 N. W. 241. Held: Not a partnership but an "unincorporated association" not operated for profit but for the convenience of the members. *Primm v. White*, 162 Mo. App. 594, 142 S. W. 802.

The organization was not a joint stock company because it issued no stock. It was not a partnership because it was not organized for the purpose of engaging in trade or business and no profits were contemplated. "An association is defined to be a body of persons acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." This is broad enough to cover any such organization not created for the purpose of doing business at a profit. *Branagan v. Buckman*, 122 N. Y. S. 610, aff'd 130 N. Y. S. 1106, 145 App. Div. 950.

⁹ Held: Partnership. *Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938.

Not partnership. *Brown v. Stoerkel*, 74 Mich. 269, 276, 41 N. W.

tions,¹⁰ as to which some confusion has arisen, but which are now generally admitted to be not partnerships. All of these associations found their rights and obligations on the same underlying principles and will therefore be treated in this chapter together, but so far as possible the notes will indicate for the benefit of the practitioner the kind of association each citation embodies.

A recent case illustrates the attitude of the courts toward a form of association that has lately become common and which is on the border line between associations for profit and non-profit associations. The inhabitants of a farming village started a telephone exchange, dividing the original cost between them. Those admitted later were required to pay a fixed sum for connection and to instal their own outfit. Each member of the association paid \$2 a year for the operator and a proportionate share of the expense of repairs.

921; *Roofing Co. v. International Ass'n*, 5 Ont. L. R. 424, 9 Ont. L. R. 171, 178.

Action by treasurer of a labor union for a libel against the association. Held: Partners cannot maintain a joint action for libel unless it tended to injure the business or credit of the firm. By analogy, this association cannot recover here, since it is not engaged in business. *Stone v. Textile, etc. Ass'n*, 122 N. Y. S. 460, 137 App. Div. 655.

¹⁰ Bill for dissolution as combination in restraint of trade because the association had made agreements with the unions regulating wages. Held: Not a partnership. "If it accumulates property incidentally in the promotion of its real purpose that does not change the character of the association." *Lindermann Co. v. Advance Stove Works*, 170 Ill. App. 423, 432; *Typothetae v. Union*, 102 N. W. 725, 727 (Minn.).

Members of an association of wholesalers who bought goods of a certain manufacturer received rebates which were paid by the manufacturer to the treasurer of the association and distributed by him *pro rata* to the members who had purchased. Plaintiff not a member of the association sold some of the same goods and was promised by the president of the association the rebate. He sued to recover it. Held: The members of the association were not partners. The plaintiff had no right to the rebates. The action of the president was unauthorized. *Midwood v. Wholesale Grocers Ass'n*, 20 R. I. 152, 37 Atl. 946.

Each line was entitled to one vote at meetings. Assessments were to be levied whenever the treasury funds got low. There was a provision for quorum at meetings. By an amendment of the by-laws, when a farmer sold his house the purchaser acquired his rights in the phone and membership in the association without anything further. The association did business and got credit under the name of the Waldron Telephone Exchange. A neighboring telephone exchange which was incorporated finally acquired the rights of what it claimed to be a majority of the members of the association, giving them stock in the corporation in exchange, and maintaining their telephone connection, and took possession of the association and its property. The others brought a bill against it for an accounting.

The court below decided for the corporation. This was reversed on appeal.

"The by-laws of the association provide for admitting members but not for dismissing them. In a co-partnership the withdrawal of a member generally works a dissolution. In a joint adventure which is neither a partnership nor joint stock company the fact of the withdrawal of a member, there being no express agreement on the subject, would not ordinarily work a dissolution. The practice of permitting the one who purchased the property and the telephone of the member of the complainant association to 'step into the shoes of the man he bought of' seems not to have been intended as a recognition of the right of the withdrawing member to sell an interest in the association, but merely as the receipt of a new member in place of the one going out.

"As a general rule there can be no partnership where

parties have not by agreement created one. This may be said also of joint stock companies and indeed of all joint adventures. They are with greater or less particularity agreed to by the adventurers.

“A joint stock company has been defined as an association of individuals for purposes of profit possessing common capital contributed by the members composing it, which said capital is commonly divided into shares of which each member possesses one or more, and which are transferable by the owners. (Shelford on Joint Stock Companies, 1. Bouvier’s Law Dictionary.) The complainant association never had any capital and never had any shares of stock. As between the members it was not a corporation, a partnership or a joint stock association. It was not organized for profit, neither was it a club or other social or benevolent institution. It was not intended by those associating that the withdrawal of a member should work a dissolution of the association or that any interest should be transferable except when a member did in fact sell his home or place of business and his telephone. The purchaser might, as owner, become a member if he cared to do so. It was intended and agreed that the internal affairs of the association should be controlled directly by its officers rather than by a majority of its members. There is no reason why these mutual and innocent agreements and understandings of members should not be given effect, and we find in them and in the business carried on no foundation for the claim that less than all of the members may, by withdrawal or by an attempted transfer of interests to a third party, compel either a sale of the property of the association or a dissolution. We are not required to give the association

a name indicating its legal status. It is a joint adventure. For purposes of judicial control we regard it as nearest like a partnership. If there are reasons growing out of internal dissensions or debts or a failure to secure the joint benefit sought for by the associates for the interference of a portion of its members in behalf of all of them in judicial proceedings, we have no doubt of the power of the Court of Chancery to investigate and to grant relief as it would do in the case of a partnership. No such action could be taken by the Hillsdale Telephone Company, which is not and cannot become a member of the complainant association. It is recited in the decree as one of the premises for the release granted that there has been such dissension among the interests of Waldron Telephone Exchange as to render its further continuance unprofitable and unsatisfactory under the present conditions, and to require its dissolution.

“There is perhaps some testimony tending to prove dissensions, but there is little evidence of dissension with respect to the internal affairs of complainant association. We have stated the cause of the trouble. It was found by the trial court that the Hillsdale County Telephone Co. is the owner of a majority of the stock and interests of, in and to the Waldron Telephone Exchange. We hold it is not such owner; that it is wrongfully in possession of the property of the Waldron Telephone Exchange, and should account for its use to the Association. Those members of the Waldron Telephone Exchange who have formerly transferred their interests to defendant are for the purposes of this case regarded as still members of such exchange. We do not find evidence which convinces us that the members

of the Waldron Telephone Exchange desire, because of its insolvency or mismanagement, its dissolution and a sale of its assets, or that there is such cause as in case of a partnership would require its dissolution.”¹¹

It sometimes happens that an association originally organized for some purpose other than profit departs from its first purpose and engages in business. In such cases, when once it is found as a fact that the association is in business for the purpose of gain, the rules of partnership apply.¹²

Organizations for all the purposes above mentioned to-day are usually incorporated, except social clubs, stock exchanges and trade unions. When incorporated, however, they organize under statutes distinct from those authorizing business corporations. The statutes regulating incorporated benefit societies are usually elaborate, but the others are seldom so. The general law applicable to such corporations differs in many respects from that relating to business corporations. To a large extent it is not different from the rules applicable to non-profit associations discussed in this chapter and the cases are frequently cited indiscriminately, though it has been said by an eminent judge that the rights of members of a corporation depend on the statutes creating the corporation and such cases are not

¹¹ *Moore v. Telephone Co.*, 171 Mich. 388, 399, 137 N. W. 241.

¹² The court was unable to tell on the facts whether an athletic association was a partnership or not. *O'Rourke v. Kelley, the Printer Corp.*, 156 Mo. App. 91, 135 S. W. 1011.

A missionary society was held a partnership because engaged in the sale of religious books at a profit. *Slaughter v. American Baptist Missionary Soc.*, 150 S. W. 224, 227 (Tex.).

Members of a social club carrying on business are not liable unless they authorized the obligation. Apparently held liable because they knew business was being conducted. *Fetner v. American National Bank*, 84 S. E. 185 (Ga.).

authorities in the case of an unincorporated association.¹³ The citations in this chapter, however, will be confined to unincorporated associations except when otherwise indicated.

The principal differences between the incorporated and unincorporated non-profit associations resemble those between partnerships and business corporations, arising out of the full recognition by the courts of the entity of the corporation and incomplete recognition of the entity of the unincorporated association. There is uncertainty as to the rules regarding legal title to property of unincorporated associations, whereas the law as to the title to property of corporations is clear.

Unincorporated associations apart from statute appear in court through individual members, corporations in the corporate name. The members of corporations are not ordinarily individually liable for its debts, whereas members of unincorporated associations may be liable on principles of agency for debts authorized or ratified, and the remedy of members for deprivation of rights is properly in equity, and not at law.

§ 55. Admission of Members

Disputes frequently arise as to who are members of informal associations. The facts upon which these cases are decided are of great variety.¹

¹³ *Lurton, J., in Nance v. Busby*, 91 Tenn. 303, 320, 18 S. W. 874.

¹ Membership was held a question of fact for the jury. Defendant had been advertised as an officer. *Murray v. Walker*, 83 Ia. 202, 48 N. W. 1075.

Action of slander by voluntary association. Defendant set up that some of the plaintiffs who were named as individuals were not members and that, therefore, the action failed. Held: Question of fact for jury whether they were members or not. Signing constitution and paying fee or attending meetings after this was done for him by an-

The association has, of course, the right to determine the limitations of its membership. On a bill in equity to compel a labor union to admit two workmen the court said: "The very idea of such an organization is association mutually acceptable and in accordance with regulations agreed upon, a power to require the admission of a person in any way objectionable to the society is repugnant to the scheme of its organization. . . .

other was all evidence to be considered. *Smith v. Hollister*, 32 Vt. 695, 704.

The constitution of an agricultural association provided that exhibitors at its fairs should buy tickets making them members. In an action under a statute for a debt of the association it was held still open to defendant to show that the tickets though stamped "Membership" were delivered and taken as admission tickets only. *Tarbell v. Gifford*, 82 Vt. 222, 72 Atl. 921.

Ownership of a pew is at least evidence of membership in a religious society, and when no other than pew holders are able to prove their membership they may be deemed the beneficiaries. *Attorney General v. Federal St.*, 3 Gray 145.

When members seceded from a church and built a new one, but later returned, they were still members of the original church. The original trustees of the society continued to hold title for it. *Peterson v. Samuelson*, 42 Neb. 161, 164, 60 N. W. 347.

Withdrawal from the place of worship and establishing another is not necessarily withdrawal from the society. *Perry v. Tupper*, 74 N. C. 722. See *Peterson v. Samuelson*, 42 Neb. 161, 164, 60 N. W. 347.

Majority of walnut growers' association formed corporation and took over its property. Four declined to recognize the corporation and took in four more and now claim to be the association and entitled to its property, on the theory that the others have withdrawn. No formal withdrawal occurred. It was found as a fact below that they did not withdraw. Held: Plaintiff's case fails because it was found that defendant had not withdrawn. They clearly did not intend to part with right in the property. They may have intended to destroy the association and may have failed, but did not intend to withdraw. *Strong v. Growers' Ass'n*, 137 Cal. 607, 610, 70 Pac. 734.

Where a stock exchange reorganized and transferred its assets to a new association with new constitution and by-laws, membership in the old exchange did not *ipso facto* confer membership in the new (p. 37). One cannot invoke the benefits of membership or incur any liability under the rules unless he has consented to them (p. 38). Delay of one year in claiming membership during (p. 40) which membership became of value, was *laches*. *Konta v. Stock Exchange*, 189 Mo. 26, 87 S. W. 969.

The body has a clear right to prescribe the qualifications for its membership; it may make it as exclusive as it sees fit; it may make the restriction on the line of citizenship, nationality, age, creed or profession, as well as numbers. This power is incident to its character as a voluntary association and cannot be inquired into except on behalf of some person who has acquired rights in the organization and to protect such rights.”² It cannot be compelled to admit as members persons whom it chooses to exclude.³ Stock exchange seats, so-called, which frequently have a high financial value, are in fact merely privileges incident to membership. Under the rules of the exchange the value of membership may be realized by transfer to persons approved by the association but subject to the regulations of the exchange, which usually provide that the proceeds must first be applied to pay obligations to other exchange members.⁴ Though to a certain extent it is treated as property⁵ it is only when the

² *Mayer v. Journeymen Stonecutters' Ass'n*, 47 N. J. Eq. 519, 524, 20 Atl. 492.

³ “No one can be compelled to join and no society can be compelled to admit a member against its will fairly expressed at a regular meeting by a majority vote.” *Richardson v. Francetown Union Cong. Soc.*, 58 N. H. 187.

⁴ *Hyde v. Woods*, 94 U. S. 523, 525, 24 L. ed. 264. The claim of one who furnished money to buy a seat is subject to the claims of the other members according to the rules. *Thompson v. Adams*, 93 Pa. St. 55, 66.

The proceeds of the sale by the exchange of the seat of an expelled member belong to the exchange and not to his assignee. *Belton v. Hatch*, 109 N. Y. 593, 17 N. E. 225.

The following case *contra* is probably not now law. *Sewell v. Ives*, 61 How. Pr. (N. Y.) 54, 56.

⁵ Membership in a stock exchange is property passing to a trustee in bankruptcy. *Hyde v. Woods*, 94 U. S. 523, 24 L. ed. 264; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915, 12 S. Ct. 104; *Page v. Edmunds*, 187 U. S. 596, 47 L. ed. 318, 23 S. Ct. 200; *Platt v. Jones*, 96 N. Y. 24; *re Ketchum*, 1 Fed. 840 (C. C. — N. Y.); *Odell v. Boyden*, 150 Fed. 731 (C. C. — N. Y.). Though not available till claims of other members are satisfied according to the rules. *Re Currie*, 185 Fed.

exchange itself has acted and disposed of the seat that its proceeds become available.⁶

A somewhat similar situation arises in the cases relating to "farmers' telephone lines." These are frequently informal associations in which membership is limited by the physical capacity of the service installed. Hence the question whether membership can be sold with the farm is important. It is held that the association has a right to control its own membership.⁷ One who attends a meeting and votes on a proposition, cannot thereafter dispute his membership.⁸ A change

263. It also passes to a receiver in supplementary proceedings on execution against the owner (incorporated exchange). *Powell v. Waldron*, 89 N. Y. 328. A pledge of the seat gives an equitable lien. *Nashua Bank v. Abbott*, 181 Mass. 531, 63 N. E. 1058. It is subject to an inheritance tax on descent of "property" or "estate." *Re Hellman*, 174 N. Y. 254, 66 N. E. 809. A seat is capital invested in business. (Per Vann, J., in *People v. Feitner*, 167 N. Y. 1, 17, 60 N. E. 265.) Membership in a board of trade or exchange is taxable to the member as property under a general property tax (corporation). *State v. McPhail*, 124 Minn. 398, 406, 145 N. W. 108; *O'Dell v. Boyden*, 150 Fed. 731 (dictum). Held: That the tax statutes did not in fact include it. *Mayor v. Johnson*, 96 Md. 737, 54 Atl. 646 ((dictum); *People v. Feitner*, 167 N. Y. 1, 60 N. E. 265 (dictum). Held: Not property, but a mere personal privilege, and so not taxable. *San Francisco v. Anderson*, 103 Cal. 69, 36 Pac. 1034. Held: Not property. Dictum that could not be seized on execution for debt of a member. *Thompson v. Adams*, 93 Pa. St. 55, 66.

⁶ Pledgee not allowed to sell seat. *Ketcham v. Provost*, 141 N. Y. S. 437, 441. Dictum that court has no power to compel admission of purchaser of seat at a judicial sale. *People v. Feitner*, 167 N. Y. 1, 7, 60 N. E. 265.

⁷ Dispute between vendor and vendee of farm as to whether phone went with sale or not. Plaintiff was voted in provided he settle satisfactorily with vendor. Vendor then assigned his rights to another, who connected. Held: Plaintiff not a member under the vote. *Staples v. Hobbs*, 145 Ia. 114, 120, 123 N. W. 935. The company had a right in good faith to control its membership and the purchaser could not be deemed a member merely by virtue of his warranty deed. *Cantrill Telephone Co. v. Fisher*, 157 Ia. 203, 138 N. W. 436, 438; *Staples v. Hobbs*, 145 Ia. 114, 123 N. W. 935. Membership in an association is not transferable. *Moore v. Telephone Co.*, 171 Mich. 388, 399, 137 N. W. 241; *Branagan v. Buckman*, 122 N. Y. S. 610, aff'd 130 N. Y. S. 1106, 145 App. Div. 950.

⁸ *Francis v. Perry*, 144 N. Y. S. 167, 82 Misc. 271.

in the scope of the membership does not affect the identity of the organization.⁹

This question has come up in connection with so-called clubs formed to evade the liquor laws. In these the limitations on membership are usually nebulous. As was said in *Commonwealth v. Pomphret*,¹⁰ "the word 'club' has no very definite meaning. Clubs are formed for all sorts of purposes and there is no uniformity in their constitutions and rules." A *bona fide* club with limited membership owning property in common may distribute it to members. Many clubs furnish food and drink to members for money. If the main purpose of the club were to furnish liquor to members on a valuation determined by the club and any person could become a member on purchasing a ticket, the organization itself might show an intent to sell liquor to any one who offered to buy. "One inquiry always is whether the organization is *bona fide* a club with limited membership, into which admission cannot be obtained by any person at his pleasure and in which the property is actually owned in common with the mutual rights and obligations which belong to such common ownership under the constitution and rules of the club, or whether either the form of a club has been adopted for other purposes with the intention and understanding that the mutual rights and obligations of the members

⁹ A county branch of a national organization was originally composed of delegates from subordinate branches, but by amendment of the national constitution members of local branches were made individually members of the county branch. A bill brought by the county branch after the change to enforce a trust created for the county branch before the change was held good, the organization being the same despite the change in membership. *Munroe County Alliance v. Owens*, 25 So. 876 (Miss.).

¹⁰ 137 Mass. 564, 567.

shall not be such as the organization purports to create or a mere name has been assumed without any real organization behind it.”¹¹

§ 56. Expulsion of Members

It has been said by high authority that courts have no jurisdiction to interfere to prevent the expulsion of a member except on the theory of protection to his property rights. A man was expelled from a labor union for apprenticing his son in a non-union shop. The court (Jessel, M.R.) said: “The first question I will consider is, what is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction I am aware of reposed in this country, at least in any of the Queen’s courts, to decide upon the rights of persons to associate together when the association possesses no property. . . . That is to say, courts as such have never dreamt of enforcing

¹¹ *Commonwealth v. Pomphret*, 137 Mass. 564, 567. A liquor dealer formed a partnership association with regular organization in the form of an unincorporated company. Members paid \$1 for a ticket which was in the form of a certificate of membership. When one got a drink the ticket was punched for a certain amount up to \$1. Held: The whole scheme was a device to evade the law and defendant was really selling the liquor. But even if the partnership really owned the stock it would have more right to sell to members without a license than defendant would have. *Rickart v. People*, 79 Ill. 85, 90. *Acc. State v. Mercer*, 32 Ia. 405.

Though the police cannot have access to a private clubhouse to interfere with festivities which are not a breach of the peace, when tickets to a ball were sold publicly to any one who sought one and liquor sold indiscriminately to those admitted, this rule cannot be invoked. *Cerele Français v. French*, 44 Hun 123.

agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure or for the purpose of scientific pursuits or for the purpose of charity or philanthropy — in such case no court of justice can interfere so long as there is no property the right to which is taken away by the person complaining.”¹

But the rule is not quite so broad as that. While it is true that there is inherent power in an association² not organized for profit to remove a member

¹ The court, however, held that the trade union benefits were such a property right, but that the restraint of trade purposes made the union illegal and the contract therefore not enforceable. *Rigby v. Connol*, L. R. 14 Ch. Div. 482, 487. Acc. (on principle quoted in the text) *Lambert v. Addison*, 46 L. T. Rep. N. S. 20, 24. *Bouldin v. Alexander*, 15 Wall. 131, 138 (church); *Watson v. Garvin*, 54 Mo. 353, 378 (dictum church). An allegation that membership in a church is a valuable right is insufficient. *State v. Cummins*, 171 Ind. 112, 85 N. E. 359. The office and salary of lay delegate of a church which will be lost on expulsion is not such a property right. *Hatfield v. DeLong*, 156 Ind. 207, 210, 59 N. E. 493. Expulsion from a church without notice. *Lurton, J.*, refused to inquire into it. *Nance v. Busby*, 91 Tenn. 303, 323, 325, 18 S. W. 874.

So long as there is no infringement of the rights of a citizen and no conflict with the jurisdiction of the State, church associations should be free from the interference of courts where there is drawn in question only the right of such organizations to try and, if need be, expel its members for the violation of a church ordinance or law. *Pounder v. Ashe*, 44 Neb. 672, 63 N. W. 48, overruling 36 Neb. 564, 54 N. W. 847.

“When membership in a religious corporation depends on membership in the congregation or religious association the courts in order to determine the right to be a member of the corporation must determine on membership in the congregation; and it must do this by the rules which the congregation has adopted for its membership. If the rules make adherence to particular doctrines a condition of membership, the rejection of those doctrines ought to determine a member’s right to remain in the congregation, or if it does not, *ipso facto*, operate to exclude him, it would certainly be good reason for his expulsion.” *Trustees v. Henschell*, 48 Minn. 494, 495, 51 N. W. 477.

² *McKane v. Adams*, 123 N. Y. 609, 613, 25 N. E. 1057 (political committee local organization disbanded by the general body); *Cheney*

for cause where no property rights are involved, the method of expulsion adopted must not be arbitrary,³ must conform to any rules previously⁴ adopted by the association applicable to expulsion and must conform to the elementary conception of judicial fairness. "No proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge and is warned of the consequences of refusing to do so."⁵ The court will not inquire into the reasonableness of the ground for expulsion. "All a court can consider," said Brett, L.J., "is whether anything has been done contrary to natural justice, though within the rules of the club; whether action of the club was according to its rules, and whether the decision of the club is *bona fide*."⁶

v. Ketcham, 5 Ohio Nisi Prius Rep. 139, 141; *Crow v. Capital City*, 26 Pa. Sup. Ct. 411, 422 (beneficial order); *Manning v. San Antonio Club*, 63 Tex. 166, 170. *Contra*, unless the charter expressly so provides, *Evans v. Philadelphia Club*, 50 Pa. St. 107. *Jessel, M.R.*, in *Dawkins v. Antrobus*, L. R. 17 Ch. D. 615, 620, said *obiter* that a club has no inherent power to expel. The point was not considered on appeal.

³ *Burke v. Roper*, 79 Ala. 138, 144 (church society); *Hanley v. Elm Grove Co.*, 150 Ia. 198, 129 N. W. 807 (farmers' telephone line — dictum).

⁴ Where the original rules provided for amendment, it was held that a social club had the right to alter the rules so as to expel a member. *Dawkins v. Antrobus*, L. R. 17 Ch. D. 615, 634, 44 L. T. Rep. n. s. 557, 29 Weekly Rep. 511; *Dawson v. Hewell*, 118 Cal. 613, 621, 50 Pac. 763, 49 L. R. A. 400.

⁵ Lord Denman in *Innes v. Wylie*, 1 C. & K. 257, 47 E. C. L. 255, 262 (plaintiff had used menacing language towards another member. This was said to be misconduct justifying expulsion). *Acc. Grassi v. O'Rourke*, 153 N. Y. S. 493, 498 (employers' ass'n).

⁶ *Dawkins v. Antrobus*, 17 Ch. D. 615, 631, 44 L. T. Rep. n. s. 557, 29 Weekly Rep. 511 (social club); *Baird v. Wells*, L. R. 44 Ch. D. 661, 670; *Lyttleton v. Blackburne*, 45 L. J. Ch. 219, 222; *Lambert v. Addison*, 46 L. T. R. n. s. 20. In one case it was said that where there were by-laws, not unreasonable, they must be followed; where none, the court will inquire only whether he had reasonable notice, fair opportunity of presenting his defense in accordance with general principles of law and justice. *Mutual aid society. Von Arx v. San Francisco Verein*, 113 Cal. 377, 45 Pac. 685. "Only in case of gross injustice will the court inter-

Beyond these limits the courts will not inquire collaterally into the merits of the expulsion.⁷ Though it has been said by respectable authority that there is a difference between incorporated and unincorporated clubs in this regard,⁸ the rules stated for the former seem to be

ferre." *Engel v. Walsh*, 258 Ill. 98, 104, 101 N. E. 222. A member expelled and fined for voting contrary to the wishes of the union was reinstated. *Schneider v. Local Union*, 116 La. 270, 40 So. 700.

⁷ *Lamson v. Hewell*, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400 (Masonic lodge); *Underwriters v. Johnson*, 119 S. W. 153 (Ky.) (expulsion of insurance agent from board of underwriters. The board had maps and other property useful in insurance business and the prestige of belonging to it was valuable); *Pitcher v. Board of Trade*, 121 Ill. 412, 421, (expulsion from a board of trade depriving plaintiff of opportunity to do a profitable business. He is bound by the contract he made in joining); *Osceola Tribe v. Schmidt*, 57 Md. 98, 104 (expulsion from a benefit society depriving plaintiff of benefits); *Farmer v. Kansas City Board of Trade*, 78 Mo. App. 557 (board of trade); *Sherry's Appeal*, 116 Pa. St. 391, 397, 9 Atl. 478 (fraternal beneficial society); *Leech v. Harris*, 2 Brewst. 571, 576 (Pa.) (stock exchange).

A Republican ward committee voted to expel certain members who refused to sign a statement that they supported the full Republican ticket at a recent election. They filed a bill in equity to restrain defendants from hindering them in performance of duties as members of committee. Held: Bill dismissed. *Smith v. Hollis*, 33 Wkly. Notes Cas. (Pa.) 485.

Expulsion of an entire subordinate lodge by a supreme lodge was not authorized by the by-laws. *Holomany v. National Slavonic Soc.*, 57 N. Y. S. 720, 39 App. Div. 573.

Member of an association filed a mechanic's lien against the property of another member. He was expelled for not first submitting the dispute to arbitration. Held: Courts by law do not require submission to arbitration. Hence expulsion invalid. Peremptory mandamus issued. *Miller v. New York Builders' League*, 53 N. Y. S. 1016, 29 App. Div. 630.

⁸ *Commonwealth v. Union League of Philadelphia*, 135 Pa. St. 301, 321, 327, 19 Atl. 1030, 20 Am. St. Rep. 870, 8 L. R. A. 195. Stock exchange. Since it is not incorporated, the cases which have restored a member who had been obstructed in the exercise of his franchise do not apply "to a voluntary unincorporated body which comes into existence by a mutual agreement of the persons forming it and is thereafter carried on under rules which the body adopts for its government. A member of a corporation enjoys a franchise, the right to which is not derived from the corporation, but is created by statute or exists by prescription, and therefore cannot be taken away by act of the corporation, unless the power is given in the charter or the member has been guilty of a crime, the conviction of which would work a forfeiture of all civil rights, including the corporation franchise, or has committed acts

identical with those laid down for associations in the decisions above cited.

What is meant by saying that the proceedings must conform to natural justice seems to be merely that there must be a hearing conducted in good faith of which the accused has notice and at which he has an opportunity to be heard,⁹ and that any other special rules of the association applicable to the case shall be strictly complied with.¹⁰ Hearings need not be con-

which tend to the dissolution of the corporation, such as the defacing of its charter, the obliteration or alteration of its records and other acts tending to impair or destroy its title to those rights and privileges; in which case the expulsion of the member is but the exercise of the power incident to the right of self-preservation. In an unincorporated association membership is conferred by the organization itself, and the law cannot compel it to admit a member nor to restore one who has been expelled for not complying with the conditions upon which he was made a member. *White v. Brownell*, 2 Daly 329, 357 (N. Y.).

Member of an association filed a mechanic's lien against the property of another member. He was expelled for not first submitting the dispute to arbitration. Held: Constitution and by-laws do not require a submission to arbitration. Hence expulsion invalid. Peremptory mandamus issued. *Miller v. New York Builders' League*, 53 N. Y. S. 1016, 29 App. Div. 630.

⁹ *Labouchere v. Earl of Wharnccliffe*, L. R. 13 Ch. D. 346, 350, 352 (social club); *Durel v. Perseverance Fire Co.*, 47 La. Ann. 1101, 17 So. 591 (fire company); *Watson v. Garvin*, 54 Mo. 353, 381 (church); *Jones v. State*, 28 Neb. 495, 498, 44 N. W. 658 (religious society); *Lewis v. Wilson*, 121 N. Y. 284, 288, 24 N. E. 474, 30 N. Y. St. 987 (stock exchange. Had notice but did not attend hearing); *People v. Manhattan Chess Club*, 52 N. Y. S. 726 (social club. Opening sealed letter addressed to another); "And a proper finding and judgment has been entered on the facts," *Crow v. Capital City*, 26 Pa. Sup. Ct. 411, 424 (beneficial order); *Cotton Ass'n v. Taylor*, 23 Tex. Civ. App. 367, 56 S. W. 553 (labor union); *Guinane v. Sunnyside Boating Co.*, 21 Ont. App. 49 (instead of attending, he wrote for particulars).

Dictum that hearing is unnecessary when there is no denial of facts that justify expulsion. *Munroe v. Colored Ass'n*, 135 La. 894, 66 So. 260.

¹⁰ *Dingwall v. Assoc.*, 4 Cal. App. 565, 569, 88 Pac. 597; *Rabb v. Trevelyan*, 122 La. 174, 47 So. 455; *Harris v. Aiken*, 76 Kan. 516, 520, 92 Pac. 537 (live stock exchange); *Kopp v. White*, 65 N. Y. S. 1017, 1019 (Masonic lodge).

Where the appellate body of a Chamber of Commerce in overruling a decision of its arbitrators as to the making of a contract, ignored certain of its own rules regarding the agency of clerks, it was held that this

ducted according to the strict rules of evidence or procedure of law courts.¹¹ Where no rule of the club provides for notice the association or its proper officers may decide how notice shall be given in any particular

error was jurisdictional and the chamber was enjoined against expelling the plaintiff. *Bartlett v. Bartlett, etc. Co.*, 116 Wis. 450, 467, 93 N. W. 473.

Injunction granted against trial by a judicatory not constituted according to the law of a church. "As an unlawful expulsion would affect appellant's standing in the community and accomplish an injury for which there is no adequate remedy at law." *Hatfield v. DeLong*, 156 Ind. 207, 211, 59 N. E. 483.

When officers and members of one association which does not forbid its members to join another, join another association whose by-laws forbid its members to belong to another association, they do not forfeit membership or vacate offices in the first association. *Warnebold v. Grand Lodge*, 83 Ia. 23, 48 N. W. 1069. See § 59, note 3.

¹¹ *Derry v. G. H. L. M. M.* 135 Mich. 494, 98 N. W. 23. May delegate to a committee the taking of testimony and making a report on it, though expulsion is to be the act of the society and not of the committee. *State v. Medical Soc.*, 91 Mo. App. 76, 83.

The fact that some of the board in pursuance of their duties started the investigation did not prevent their sitting in judgment. Association may delegate power to expel to a committee, making such action final. *Harris v. Aiken*, 76 Kan. 516, 92 Pac. 537 (live stock exchange). Not bound to confine itself to legal evidence. *Guinane v. Sunnyside Boating Co.*, 21 Ont. App. 49.

When the determination of a question is committed to a board or committee of definite members who act by delegated powers under a provision that their act shall be by a majority or two-thirds, this means a majority or two-thirds of all the members. When to a body of undefined numbers who act by original not delegated powers, it means a majority or two-thirds of those who take part. *Krause v. Sander*, 122 N. Y. S. 54, 57, 66 Misc. 601.

Under a by-law providing that the accused is entitled to present his case, he is entitled to be confronted with all witnesses against him and hear their testimony. *Raych v. Hadida*, 130 N. Y. S. 346.

Action by Shakers expelled from the society for their disbelief. There was an informal hearing by the proper judicial body at which plaintiffs were heard, but no formal written charges (counsel argued it was a corporation). Held: Plaintiffs cannot recover on contract for past services to the society because by the constitution which they signed this was expressly renounced, nor for support since expulsion because the constitution bound the society to support members only so long as they conformed to the principles of the society. They cannot recover in tort for expulsion because the proper authority of the society has decided they do not conform. By the constitution they were made the sole judges. *Grosvenor v. United Society of Believers*, 118 Mass. 78, 80.

instance.¹² By appearing at the hearing the member expelled waives any informality in the notice.¹³ Courts do not interfere with the decisions of such societies except to see that they have acted according to their rules, in good faith and not in violation of the law of the land.¹⁴ By joining the association the member voluntarily submits himself to its rules.¹⁵ The con-

¹² *Labouchere v. Earl of Wharncliffe*, L. R. 13 Ch. D. 346, 352. *Contra*. Must be personal service as at common law. *Wachtel v. Noah Widows', etc. Soc.*, 84 N. Y. 28, 31.

When a society holds its meetings on Sunday, it may serve notice on Sunday on plaintiff of hearing set for next Sunday to try him on charges on which he was expelled. The Sunday law does not apply. *People v. Young Men's, etc. Soc.*, 65 Barb. 357 (N. Y.).

¹³ *Harris v. Aiken*, 76 Kan. 516, 520, 92 Pac. 537 (live stock exchange); *Brennan v. United Hatters*, 73 N. J. L. 729, 65 Atl. 165 (trade union. Question for jury); *Williamson v. Randolph*, 96 N. Y. S. 644, 48 Misc. 96, 104 (stock exchange); *People v. Coachman's Union Benev. Soc.*, 24 N. Y. S. 114, 4 Misc. 424, 53 N. Y. St. 560. But offering at a meeting to answer charges is not a waiver of the right to question the legality of the resolution ordering trial. *Weiss v. Musical Union*, 189 Pa. St. 446, 42 Atl. 118.

A member of an association expelled waived right to object to constitution of board appointed to try him by saying he had no objection before they started in. The vote to expel was irregular but was covered by a proper vote after the application for mandamus, but before trial. Held: Mandamus should not issue. *P. v. N. Y.*, 84 N. Y. S. 766, 87 App. Div. 478, aff'd 178 N. Y. 576, 70 N. E. 1105. *Munroe v. Colored Ass'n*, 135 La. 894, 66 So. 260.

¹⁴ *Connolly v. Masonic Mut. Ben. Ass'n*, 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428 (benefit society. Reinstatement by district deputy after expulsion); *Mulroy v. Supreme Lodge*, 28 Mo. App. 463, 469 (benefit society).

"Its findings of fact will be upset only if no honest mind could reach that conclusion on the evidence." *Williamson v. Randolph*, 96 N. Y. S. 644, 48 Misc. 96, 104 (stock exchange).

"Conclusive upon all questions, including sanity at the time of giving offense and the trial therefor." *Dodd v. Armstrong*, 18 Phila. 399 (Pa.) 43 Leg. Int. 270.

Court must presume that a trial with a view to expulsion by court of Grand Lodge will be according to natural right and the rules of the order and will not enjoin it in advance. *Hershiser v. Williams*, 6 Ohio Cir. Ct. 147, 149, 4 Ohio Dec. 17, 11 Ohio Dec. (reprint) 76, 24 Cinc. L. Bul. 314.

¹⁵ *Franklin v. Burnham*, 82 N. Y. S. 882, 40 Misc. 566 (Masonic trial prior to criminal trial. Injunction refused); *Crow v. Capital City*, 26 Pa. Sup. Ct. 411, 424 (beneficial society).

Member of stock exchange cannot ask reinstatement on the theory

stitution and by-laws are a contract with the members.¹⁶ Hence if his contract of membership involves illegal provisions, he cannot enforce it by seeking reinstatement after expulsion.¹⁷

When a member has been deprived of property rights the courts have been quicker to protect him¹⁸ and have inquired into the reasonableness and propriety of his expulsion,¹⁹ though they have not always expressed

that the contract for which he was expelled was a gambling contract. *Lewis v. Wilson*, 121 N. Y. 284, 288, 24 N. E. 474, 30 N. Y. St. 987.

If a penalty of expulsion for work on non-union material is a legal purpose for a labor union, a member can be expelled for failure to abide by it. *Bossert v. United Brotherhood*, 137 N. Y. S. 321, 324, 77 Misc. 592.

By-laws of club provide means for expulsion. Held: Every member has contracted to be bound by it. *Wood v. Wood*, L. R. 9 Ex. 190; *While v. Damon*, 7 Ves. 35.

¹⁶ *Dingwell v. Assoc.*, 4 Cal. App. 565, 569, 88 Pac. 597; *Krause v. Sander*, 122 N. Y. S. 54, 57, 66 Misc. 601 (trade union).

¹⁷ *Greer v. Stoller*, 77 Fed. 1 (C. C. — Mo.) (member of live stock exchange); *Froelich v. Benefit Ass'n*, 93 Mo. App. 383, 391 (trade union, called combination in restraint of trade).

¹⁸ *Hanley v. Tel. Co.*, 150 Ia. 198, 129 N. W. 807, 808 (farmers' telephone line — dictum); *Froelich v. Benefit Ass'n*, 93 Mo. App. 383, 389 (trade union. Death benefit).

¹⁹ *Clery v. Brown*, 51 How. Pr. (N. Y.) 92, 96 (member of a benefit society expelled for violating its rules); *Froelich v. Benefit Ass'n*, 93 Mo. App. 383, 389.

Member of a benefit order claimed sick benefit and was expelled for bringing suit before submitting it to arbitrators according to by-laws. Held: "We consider that any by-law which provides for the expulsion of a man from a society in which he has vested property interests is a violation of the constitution of the Commonwealth." *Sweney v. Hugh McLaughlin Soc.*, 14 Weekly Notes Cas. 466, 468 (Pa.).

The New York baseball club was excluded from the national association without a hearing, as required by its constitution. Bill for injunction. Held: Membership is property right of which it cannot be deprived without having done some act that is ground for forfeiture and notice and trial. "It is said that the association possesses no property itself. While it may have very little property itself, it is evident it has some property. It pays its president a salary of \$1800 a year." The privilege of playing against the other clubs is very profitable. "These are certainly rights of property which are entitled to the protection of the law." Could not be expelled without notice or trial, so do not have to pass on propriety of grounds of forfeiture. *Metropolitan Base Ball*

clearly this distinction as a ground for their decisions. In a leading case the court said that the inherent right of expulsion could be exercised only for violation of established rules assented to by the members which provided expulsion as a penalty for such violation or for "such conduct as clearly violates the fundamental objects of the association and if persisted in and allowed would thwart those objects or bring the association into disrepute."²⁰ An unauthorized expulsion is not validated by a by-law adopted for that purpose after the expulsion.²¹

Members have been ordered reinstated by courts because the notice to the plaintiff was held to have been insufficient,²² because he had been expelled without trial and an opportunity to defend upon specific

Ass'n v. Simmons, 17 Wkly. Notes Cas. (Pa.) 153, 155, 17 Phila. (Pa.) 419, 42 Leg. Int. (Pa.) 520, 1 Pa. Co. Ct. 134.

Courts interfere only (1) if decision is contrary to natural justice. (2) Rules of the club are not observed. (3) Action is malicious and not *bona fide*. Here a member of a labor union entitled to benefits was expelled for not joining in a strike. The penalty of the by-laws was a fine. Later, on a strike settlement conditioned on his discharge, reinstated him and immediately expelled him for conspiracy to injure the association. Held: Not *bona fide* and mandamus issued. Otto v. San Francisco, etc. Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

Member of a labor union expelled for non-payment of an unauthorized fine was restored. Meurer v. Detroit Musicians, etc. Ass'n, 95 Mich. 451, 54 N. W. 954.

Member of a fire company expelled for non-payment of dues increased after the association had liquidated its assets was held invalid because the new by-law seemed unreasonable. Plaintiff held entitled to share in the property. Engine Co. v. C., 93 Pa. 264, 270. One member of a lodge threatened to kill another. Members expelled him. Held: Not unlawful conspiracy, as they had grounds for expulsion. Moon v. Flack, 74 N. H. 140, 65 Atl. 829.

²⁰ Otto v. San Francisco, etc. Union, 75 Cal. 308, 314, 17 Pac. 217.

²¹ Pirics v. First Russian Soc., 83 N. J. Eq. 29, 89 Atl. 1036 (benefit society).

²² Fritz v. Muck, 62 How. Pr. 69 (N. Y.) (benefit society); Fisher v. Keane, L. R. 11 Ch. D. 353, 362 (club); State v. Baseball Ass'n, 61 Wash. 79, 82, 111 Pac. 1055 (no notice in notice of special meeting, though the member attended).

charges,²³ because the by-laws of the association had not been complied with²⁴ or because the charges were not made in good faith.²⁵ Where the rules imposed only a fine, a forfeiture could not be decreed also.²⁶

Some courts hold that a petition for mandamus is the correct procedure to obtain restoration to membership.²⁷ The writ of mandamus was originally a prerogative writ directed to a public official. In this country it has ceased to be a prerogative writ and its use has been extended from cases involving the duties of public officials to those of officers of private corporations. Since corporations derive their existence

²³ *Byrne v. B. U.*, 74 N. J. L. 258, 65 Atl. 839. "The legal principle is a general one, affecting all proceedings which may result in loss of property, position or character, or any disaster to another, that he shall first be heard by the board or tribunal considering his case before that body will be legally permitted to pronounce his condemnation." *Loubat v. Le Roy*, 40 Hun 546, 551.

²⁴ *Savannah Cotton Exchange v. State*, 54 Ga. 668, 670 (appeal limited to jurisdiction of arbitration committee refused); *Loubat v. Le Roy*, 40 Hun 546, 551 (a vote requiring two-thirds vote of governing committee meant two-thirds of whole, not two-thirds of quorum); *Manning v. Klaus*, 1 Pa. Super. Ct. 210 (the committee that heard him practically acquitted him, but the vote of the master barbers' association expelled him. Also, acts in performance of a duty do not justify expulsion under a by-law providing it for conduct tending to the injury of fellow members. Sunday closing); *Baird v. Wells*, L. R. 44 Ch. D. 661, 670 (committee acquitted, then, after a resolution of the club, reversed its action); *Mesisco v. Giuliano*, 190 Mass. 352, 354, 76 N. E. 907 (the language of the court would seem to limit it to cases where property rights are violated. Benefit society).

A leader of an orchestra was fined by musicians' union for cutting prices contrary to by-laws. It appeared that the fine imposed was under a set of by-laws then repealed by the adoption of a new and comprehensive code, though no formal repeal of old set was voted. Held: This affected the jurisdiction of the order and can be collaterally attacked in this proceeding. Injunction to restore him to order will issue. *Bachman v. Harrington*, 102 N. Y. S. 406, 411, 52 Misc. 26.

²⁵ *Von Arx v. San Francisco Verein*, 113 Cal. 377, 45 Pac. 685.

²⁶ *Wachtel v. Noah Widows', etc. Soc.*, 84 N. Y. 28.

²⁷ *Von Arx v. San Francisco Verein*, 113 Cal. 377, 45 Pac. 685 (mutual aid society); *Savannah Cotton Exchange v. State*, 54 Ga. 668, 670 (exchange).

from the State, this extension does not justify a further extension of the writ to cases involving the duties of officers of unincorporated associations the existence of which depends solely upon contract. It seems well settled that it is not available in cases involving rights arising merely out of private contracts. The better rule, therefore, is that mandamus is appropriate only when addressed to officers of corporations²⁸ and public officials, and that a bill in equity for an injunction is the proper practice in cases of unincorporated associations.²⁹ It has been held that where no property rights are involved an injunction will not issue but the plaintiff will be left to his remedy in damages.³⁰ It has also been said that mandamus will be refused in the discretion of the court when it is obvious that an irregular expulsion will immediately be corrected by a proper proceeding.³¹ When properly expelled, a member of a Masonic lodge could not recover dues paid where no fraud had been practised on him.³² To include a claim for sick benefits was held multifarious.³³ For an

²⁸ *State v. Cummins*, 171 Ind. 112, 85 N. E. 359 (church); *Burt v. Grand Lodge*, 66 Mich. 85, 87, 33 N. W. 13 (Masonic lodge); *Doyle v. Burke*, 29 R. I. 123, 126, 69 Atl. 362; *Mesisco v. Giuliano*, 190 Mass. 352, 76 N. E. 907 (benefit society). See query in *Hickey v. Baine*, 195 Mass. 440, 452, 81 N. E. 201.

²⁹ *Mesisco v. Giuliano*, 190 Mass. 352, 76 N. E. 907 (benefit society); *Fritz v. Muck*, 62 How. Pr. 69 (N. Y.) (benefit society); *Fisher v. Keane*, L. R. 11 Ch. D. 353, 362 (club); *Pirics v. First Russian Soc.*, 83 N. J. Eq. 29, 89 Atl. 1036 (but because it would be inequitable to force the reunion of warring factions after an illegal expulsion, the decree was for distribution of part of fund and not reinstatement).

³⁰ *Rowe v. Hewitt*, 12 Ont. L. R. 13 (professional hockey club); *Baird v. Wells*, L. R. 44 Ch. D. 661, 670 (social club). "Where the question presented does not involve tangible and valuable corporate privileges we cannot interfere in this way." *Burt v. Grand Lodge*, 66 Mich. 85, 87, 33 N. W. 13.

³¹ *State v. Baseball Ass'n*, 61 Wash. 79, 82, 111 Pac. 1055.

³² *Robinson v. Yates*, 86 Ill. 598.

³³ *Mesisco v. Giuliano*, 190 Mass. 352, 354, 76 N. E. 907.

unlawful expulsion the member expelled may sue those who expelled him and recover damages.³⁴ "The loss sustained by the plaintiff in being deprived of the use and enjoyment of the property of the society and the privileges of membership were proper elements of damages, as was also the mental suffering of the plaintiff, caused by his wrongful expulsion and the manner in which it was effected."³⁵ A decision of reinstatement in a benefit society is not *res judicata* of unlawful expulsion in an action for damages therefor.³⁶

§ 57. Exhaustion of Remedies within the Association

The reluctance of courts to interfere in the affairs of unincorporated associations is shown by their rule that before a member applies to a court for relief he must have exhausted his remedies within the association.¹

³⁴ *Schneider v. Local Union*, 116 La. 270, 40 So. 700 (trade union); *Connell v. Stalker*, 48 N. Y. S. 77, 21 Misc. 609.

Member of a trade union may have an action against his fellow members for conspiracy to expel him unlawfully. *Campbell v. Johnson*, 167 Fed. 102 (C. C. A. — Wash.).

If proved, he is entitled to exemplary damages against those actuated by malice. *St. Louis Ry. v. Thompson*, 102 Tex. 89, 113 S. W. 144.

A national union was held liable for expulsion by a local in disregard of rules requiring procedure for it. *Schouten v. Alpine*, 137 N. Y. S. 380, 77 Misc. 19.

Union member fined and expelled sued local council for damages. Pending the suit he appealed within the order and was reinstated. Held: Appeal was not a waiver of right to damages. *Blanchard v. Newark Council*, 77 N. J. L. 389, 71 Atl. 1131.

³⁵ *Lahiff v. Benev. Soc.*, 76 Conn. 648, 57 Atl. 692, 100 A. S. R. 1012, 65 L. R. A. 92.

³⁶ *Cueurillo v. Societa*, 92 N. Y. S. 420, 102 App. Div. 276.

¹ *McCullion v. Hibernia, etc. Soc.*, 70 Cal. 163, 167, 12 Pac. 114 (members had seceded and declared offices vacant); *Engel v. Walsh*, 258 Ill. 98, 105, 101 N. E. 222 (member of union who had been deprived of union label was denied relief because he did not set forth the by-laws and so did not show that he had exhausted all rights of appeal); *Hatfield v. DeLong*, 156 Ind. 207, 209, 59 N. E. 483 (church); *Rabb v. Trevelyan*, 122 La. 174, 47 So. 455 (bookmaker sued race-track association for slander); *Chamberlain v. Lincoln*, 129 Mass. 70, 72 (bill in

This obviously does not mean resort to force.² When the only appeal provided by the association is to the same body that expelled him, the member expelled may apply directly to the court,³ but in a case where the officer appealed from was to preside over the appellate body, the general rule was applied and relief denied until the expelled member had taken the appeal provided by the rules of the order.⁴ In one case the rules of a benefit association imposed the penalty of expul-

equity by claimants to office to recover property from old officers); *Oliver v. Hopkins*, 144 Mass. 175, 10 N. E. 776 (bill in equity by members of dissolved lodge to recover funds declared forfeited to Grand Lodge); *Hickey v. Baine*, 195 Mass. 440, 452, 81 N. E. 201 (labor union election contest); *Mulroy v. Supreme Lodge*, 28 Mo. App. 463 (expelled member of benefit society); *Lafond v. Deems*, 81 N. Y. 507, 514 (bill for dissolution of benefit society); *White v. Brownell*, 2 Daly 329, 357 (stock exchange); *Strempel v. Rubing*, 4 N. Y. S. 534 (election contest); *Levy v. U. S. Grand Lodge*, 30 N. Y. S. 885, 9 Misc. 633 (election contest); *Gebhard v. N. Y. Club*, 21 Abb. N. C. 248, 252 (social club); *Zillifax v. I. O. F.*, 13 Ont. L. R. 155, 8 Ont. W. R. 631 (expulsion).

He need not enforce an appeal conditioned on compliance with findings below and paying all expenses. *Weiss v. Musical Union*, 189 Pa. St. 446, 42 Atl. 118.

² When members of an unincorporated church are excluded from membership at a meeting which they claim was not properly called, they must enforce their right to use the church property by an appeal to the court and not by trespass. *Fullbright v. Higginbotham*, 133 Mo. 668, 678, 33 N. E. 777.

³ *Loubat v. Le Roy*, 40 Hun 546, 551 (social club).

⁴ *Mead v. Stirling*, 62 Conn. 586, 27 Atl. 591 (Masonic lodge).

Plaintiff was expelled from order of locomotive engineers for alleged violation of a rule. He held insurance policies in the order as required by its rules. It appeared that he waived informalities of the trial by the order. But the court held that there was no evidence at all of commission by him of the offense of which he was found guilty by the order, viz., volunteering his advice to railroad on a matter then in controversy between railroad and employees. The rule that all rights of appeal within the order must be exercised was recognized, but exception allowed here because (1) the officer he last appealed to would preside at the meeting of the Grand International Division to which the appeal would be taken; (2) meeting to which appeal might be taken would be held out of State and at a great distance and not for two years; (3) if not reinstated by a date six months before that meeting his insurance would be forfeited. *Fritz v. Knaub*, 103 N. Y. S. 1003, 1010.

sion on any member who resorted to the courts before taking all appeals provided by the association. A member retained an attorney and was expelled under the rule before his suit was actually brought. He was allowed relief in a suit on his benefit certificate.⁵ The appeal provided must be one that can be availed of as of right and not depend on the discretion or favor of any one for its exercise.⁶ When there is no provision for a tribunal to decide when a member is entitled to sick benefits, he may appeal to a court.⁷ Indeed it has been laid down as a general rule that whereas in mere matters of discipline, the member must first exhaust all rights of appeal within the association, a claim for money due by virtue of an agreement stands on a different basis and gives a right to resort to the court in the first instance.⁸

⁵ *Ramell v. Duffy*, 81 N. Y. S. 600, 82 App. Div. 496.

⁶ Rules provided for expulsion after trial by jury. Then aggrieved could ask a delegate to the next convention to ask the convention to call the jury to account. *Holomany v. Nat. Slavonic Soc.*, 57 N. Y. S. 720, 39 App. Div. 573.

A provision for reinstatement is not a right of appeal, nor is a provision for appeal in a resolution ordering trial, but not in the by-laws, sufficient. *Weiss v. Musical Union*, 189 Pa. St. 446, 42 Atl. 118.

Not bound to pursue his remedy within the order when by-laws provided no remedy and demand for relief was met with unnecessary delay. *Schneider v. Local Union*, 116 La. 270, 40 So. 700.

When the appellate body was at an unreasonable distance and he was refused access to necessary documents unless he first paid his fine and the offense for which he was expelled was slander of the presiding officer of the appellate court, he was not obliged to appeal. *Corregan v. Hay*, 87 N. Y. S. 956, 94 App. Div. 71.

⁷ *Dolan v. Court Good Samaritan*, 128 Mass. 437, 439; *Kentucky Lodge v. White*, 5 Ky. L. Rep. 418.

⁸ *Bauer v. Samson Lodge*, 102 Ind. 262, 268, 1 N. E. 571 (corporation); *State v. Grand Lodge*, 53 N. J. L. 536, 22 Atl. 63 (dictum).

Contra. General rule applied to a suit for sick benefit. *Harrington v. Workmen's Ass'n*, 70 Ga. 340, 342.

Where a by-law of a national association under which property rights of a local were affected provided for suspension without notice,

§ 58. Internal Affairs

Courts will not as a general rule interfere in the internal affairs of non-profit associations¹ unless property rights are involved. As was said of a church, "Religious societies are regarded by the civil authorities as other voluntary associations, the individual members and separate bodies of which will be held to be bound by the laws, usages, customs and principles, which are accepted among them, upon the assumption that in becoming parts of such organisms they assented to be bound by those laws, usages and customs as so many stipulations of a contract between them. It is only by so regarding the association of individuals or bodies for religious purposes that the civil authority in this country can interfere at all, and then it can interfere only so far as may be necessary to decide upon and protect rights of property, depending upon the contract between the parties. And when the contract has been construed by the parties, the court will, as in other cases, follow their own construction."²

Ordinarily courts accept the rules adopted by unincorporated associations.³ When an association by its laws has constituted a tribunal to decide questions affecting its internal affairs, civil courts are bound by proper decisions of such tribunal where no property or civil rights are involved.

"Church tribunals ought to perform their functions it was unreasonable and void and it was not necessary to appeal to the biennial convention. *Swaine v. Miller*, 72 Mo. App. 446.

Contra. Where only membership rights involved. *O'Brien v. Musical Union*, 64 N. J. Eq. 525, 54 Atl. 150.

¹ *Randolph v. Southern Beneficial League*, 7 N. Y. S. 135, 139.

² *First Presbyterian Church v. Wilson*, 77 Ky. 252, 256. Acc. *Allen v. Roby*, 67 So. 899 (Miss.).

³ *Alexander v. Bowers*, 79 S. W. 342 (Tex. Civ. App.) (church).

honestly, impartially and justly, with due regard to their constitutional powers, sound morals and the rights of all who are interested; but if tyranny, force, fraud, oppression or corruption prevail, no civil remedy exists for such abuse except when it trenches upon some property or civil right." Hence a bill to declare void the union of two Presbyterian churches was dismissed because the church as such owned no property.⁴

A dispute over the appointment of a pastor grew out of the split in the Evangelical Alliance. It was held that the question should be settled by the proper tribunal of the association; if there was no such tribunal, it was a deficiency that could be supplied only by the association. "Courts of equity, while they may supply remedies not available in legal actions, have no jurisdiction to supplement the powers of purely voluntary associations when through improvidence they in practice are found inadequate. To concede that voluntary associations cannot govern themselves might present a convincing argument against allowing them at all to exist, but by no means affords a justification for placing them under the guardianship of the State through the courts."⁵ Some courts have insisted on the right to

⁴ *Fussell v. Hall*, 223 Ill. 73, 77, 84 N. E. 42. Acc. *Landis v. Campbell*, 79 Mo. 433, 440.

⁵ *Powers v. Budy*, 45 Neb. 208, 63 N. W. 476. Acc. *Hatfield v. DeLong*, 156 Ind. 207, 210, 59 N. E. 483.

An Episcopal clergyman was tried in a church court and convicted of adultery and removed from office. He sought certiorari in civil courts addressed to the ecclesiastical court on the ground that it was not legally constituted and for irregularities of procedure and that it had no jurisdiction of offenses that were civil crimes. Held: The church courts for the purpose of church discipline have jurisdiction of offenses against the civil law (p. 409). Civil courts have no jurisdiction by certiorari to require the production of church records to correct errors in them when the subject matter of the judgment is of ecclesiastical cognizance. On such subjects its judgment is conclusive (p. 417). A minister has no property right in his office for the purpose of earning

determine whether the court of the association was acting within its jurisdiction. These decisions were,

a salary (p. 417). When the subject matter is of ecclesiastical cognizance and the party accused is properly before the court, it is for the court to decide whether or not it is properly organized to hear the matter before it. Civil courts cannot review that determination (p. 419). *Satterlee v. Williams*, 20 App. D. C. 393.

A minister sought to enjoin a trial of him appointed by the bishop. Held: A minister as a member of a church is bound by all its rules and laws, and if he does not approve of them his only remedy is to withdraw (p. 533). Civil courts will interfere with decisions of church judicatories only when rights of property or civil rights are involved. They will not review the decisions of such associations upon ecclesiastical matters merely to ascertain their jurisdiction (p. 537). Dissent on ground that question of jurisdiction is always open in civil courts. *Chase v. Cheney*, 58 Ill. 509.

A split in a church denomination resulted in the appointment of two rival pastors for the same church. One with some of his adherents brought a bill in equity to enforce their right to use the church. The issue depended upon the validity of the calling of a general conference. This depended on whether under the laws of the church the last preceding general conference could delegate to its Board of Publication the selection of the place for the next. Held: The power whether legislative or executive is one that can be delegated. The conference was properly called and hence the plaintiff was properly appointed pastor (p. 433). He may sue to enforce his right because it involves his salary. His co-plaintiffs may sue to enforce their rights to use the church (p. 434). On such a question the decision of a church judicatory is final (p. 428). *Schweicher v. Husser*, 146 Ill. 399, 34 N. E. 1022.

Same issue decided the same way on the ground that the general conference was the supreme judicial, executive and legislative head of the denomination and that its decision on an ecclesiastical matter should not be set aside by the court. *Auracher v. Yerger*, 90 Ia. 558, 567, 58 N. W. 893.

The decision of a Catholic bishop as the judicatory of the Roman church must be followed by the civil courts. *Bonacum v. Harrington*, 65 Neb. 831, 834, 91 N. W. 886.

A minister was tried and expelled by one church court, which sentence was reversed on appeal. Held: The decision of the highest church court must prevail. *Dieffendorf v. Reformed Church*, 20 Johns. 12, 14.

A pastor sued for his salary. The issue was whether he had been properly dismissed or not, and this had been decided against him by the church judicatories. Held: The church court had jurisdiction of the question. "If I were less certain than I am as to the question of jurisdiction, I should give great weight to the decisions of these bodies." "Having thus recorded the conclusion that this was an ecclesiastical matter and that the church judicatories had jurisdiction of it, we cannot inquire whether they have proceeded according to the laws and usages of their church nor whether they have decided the matter correctly" (p. 561).

however, mostly in actions by ministers for their salaries, and so a property right was in fact involved.⁶ A

The contract made by a pastor of the church by accepting a call is terminable only by mutual consent or in the mode specified in the constitution and usages of the church. *Connett v. Reformed Church*, 54 N. Y. 551.

A burial right was conditioned on the holder being in communion with the Roman Catholic church. Held: The decision of the proper church tribunal was final on this. *McGuire v. Trustees*, 54 Hun 207, 219.

The General Assembly of the Presbyterian church is not a corporation. It unites in itself the legislative, executive and judicial functions of government. It is not subject to the correctional powers of the court other than as far as necessary to establish its identity. When it proceeded in good faith to dissolve certain synods the court cannot re-examine its conclusions. *Comm. v. Green*, 4 Whart. 531, 598 (Pa.).

A pastor sued to enforce his appointment. The issue was as to the calling of the annual conference of the Evangelical Alliance. Held: The appointment of the place of the next annual conference was an administrative function and could be delegated (p. 548). Under the discipline of the church, pastors are appointed by the conference and the will of the majority of the church does not control (p. 552). The property of the church belongs to those who adhere to the original organization and not to those who have organized an independent one (p. 551). *Krecker v. Shirey*, 163 Pa. St. 534, 30 Atl. 440.

A pastor has no property rights in his salary, in the absence of express contract, that entitles him to contest in the civil courts the decision of church tribunals in matters of church discipline. "It may be that the proceedings were irregularly conducted measured by the disciplinary standard; that is a question for the ecclesiastical or church revising authority and not for the courts." *Travers v. Abbey*, 104 Tenn. 665, 669, 58 S. W. 247.

The decision of the regular tribunals of a grange as to a matter of internal discipline (validity of admission of plaintiff) is binding on the courts. Non-observance of a by-law of the State grange by locals with knowledge of certain officers of State grange does not abrogate it. *Yeaton v. Somersworth Grange*, 77 N. H. 332, 91 Atl. 868.

⁶ A minister sued for a balance of salary, claiming that he had been dismissed by a body which had no jurisdiction of the matter. Held: The platform which was the basis of the general organization of the church being silent on the point and it depending on usage, that question of fact was properly submitted to the jury. *Gibbs v. Gilead Soc.*, 38 Conn. 153, 178.

In an action by a dismissed rector for his salary the civil courts will inquire into the jurisdiction of ecclesiastical tribunal. *Perry v. Wheeler*, 75 Ky. 541.

A Catholic priest sued for his salary. The issue was whether he had been dismissed. Held: The decision of the church councils on such matters are not conclusive until sanctioned by legal adjudication in a court of law. It is essential that their proceedings be so far formal as to

provision in the constitution and by-laws of a benefit society was held void because it purported to make final the decision of the arbitrators on the whole question of liability.⁷

Although in general, as in the expulsion cases above mentioned, the courts refuse to act in contravention to the regulations of the association to which the member has bound himself voluntarily,⁸ they have shown a enable the court to judge whether they have acted with some regard for the rights of the accused. Query, if incorporated. *Thompson v. Catholic Congregational Soc.*, 7 Pick. 160, 164. But when the salary of a priest depends on incumbency and not on contract it is not a property right enforceable in civil courts. *Hynes v. Lillis*, 170 S. W. 396 (Mo. App.).

A minister dismissed by action of his congregation sustained by the General Assembly brought a bill in equity against the General Assembly to declare its action void on the ground that the procedure on appeal was not in conformity to church law and so void. Held: There was no error in a finding that the procedure before the General Assembly was in violation of church law. *Wallace v. Trustees of General Assembly*, 201 Pa. St. 292, 296, 50 Atl. 762.

But when the tribunal of the association has itself decided the question of jurisdiction and that decision depends upon an interpretation of the organic law of the association, courts should accept it. See § 61.

⁷ *Daniher v. Grand Lodge*, 10 Utah 110, 123, 37 Pac. 245.

Injunction against arbitration committee of an exchange was denied because the agreement to arbitrate involved in assenting to its constitution was void under a statute making all agreements to arbitrate revocable. *Heath v. N. Y. Gold Exchange*, 38 How. Pr. 168.

An agreement to appeal to the Grand Lodge contained in the by-laws of a benefit society held not binding so far as it relates to property interests. *Poultney v. Bachman*, 10 Abb. N. C. 252 (N. Y.).

⁸ A statute provided for calling meetings of "parishes" or "religious societies." A lease had been authorized at a meeting called otherwise but according to by-laws. Held: Records of organization and since indicate that they have regarded themselves as a body of proprietors of the house of worship and not a parish or religious society. They call their meetings, meetings of stockholders. Hence the by-laws and meeting and lease were valid. (*Seem* private rather than public organization.) *Cogswell v. Bullock*, 13 Allen 90, 92.

A by-law of a national order required a report on amendment to be made at next meeting. In fact, the committee was continued from time to time and finally reported at subsequent meeting where report and amendment were adopted. No question was raised as to right to thus act. Local lodge divided on issue. Held: The essential spirit of the article about amendment had been observed. Cannot say action in-

tendency to depart from this and consider the reasonableness of the regulations when questions of property are involved.⁹ While they profess to refuse to decide

valid by reason of non-compliance with Art. 30. The changes were not so radical as to be beyond the power of national body. *Goulding v. Standish*, 182 Mass. 401, 404, 65 N. E. 803.

A court will inquire into questions of doctrine only to decide a question of property of a church. *Hendrickson v. Shotwell*, 1 N. J. Eq. 577, 671, 682.

A Mason was indicted for libel. He sought to enjoin a Masonic trial to be held before his criminal trial for reason that he would be forced to disclose evidence, etc. Held: Plaintiff voluntarily submitted himself to rules of the order and must stand trial according to those rules. It seems to be done in good faith. He has no property right of which he is being deprived because his only right is to enjoy the property of the order while a member in good standing. *Franklin v. Burnham*, 82 N. Y. S. 882, 40 Misc. 566.

Bill alleged that a minority of local body voted that all members who did not contribute \$1 a year towards building hall by Grand Lodge should not be permitted to attend meetings. Answer: that lodge simply obeyed an order of Grand Lodge according to its rule. Held: Bill dismissed. *Bauer v. Seegar*, 2 Weekly Notes Cas. (Pa.) 242.

Injunction granted to restrain defendant from occupying chair at meetings. There was a rule of the lodge as to one under charges. He had been tried, but the supreme council ordered a new trial. Held: This was all regular and he is still under charges and not entitled to occupy the chair. Courts have jurisdiction to enforce rules of these societies. *Potter v. Search*, 7 Phila. (Pa.) 443, 449. See *People v. Chicago Board of Trade*, 80 Ill. 134, 137 (which held that the same rule applies to corporations).

⁹ See *Littleton v. I. O. U. A. M.*, 98 Md. 453, 461, 56 Atl. 798 (where the rule of a benefit society was applied).

Members of a board of fire underwriters established rules regulating the number of solicitors who might be employed by members and who they should be, etc., practically restraining the business of members. Certain members sought to enjoin enforcement of the penalty of violation of these regulations, viz., no intercourse with other members. Held: Where there are property rights, as here, equity will interfere when by-laws are a departure from the object of the society, violate the public policy of the State or are unjust or unreasonable. This was illegal as in restraint of trade. *Huston v. Rentlinger*, 91 Ky. 333, 344, 15 S. W. 867. Acc. *Rudolph v. Southern Beneficial League*, 7 N. Y. S. 135, 139 (transfer of all its property by its officers).

Bill to recover possession of property of a local lodge confiscated by grand lodge under proceedings authorized by its by-laws. Defendants were members of local body. Held: Members bound by such agreement only if it clearly appears that they assented to it. It does not appear that by-laws of local lodge adopted by-laws of grand lodge. But even if they did, it would not be binding. Cannot make a binding

contested elections to office as such,¹⁰ when one claiming to be an officer seeks possession of property of the association held by a rival claimant the court has to decide which is the officer *de jure* in order to decide who is entitled to the property.¹¹ Ordinarily the vote of a majority of those attending a meeting is decisive.¹² No

agreement in advance to submit to arbitration. May revoke up to last moment. Courts of justice cannot be called on to enforce decrees of these self-created judicatories. *Austin v. Searing*, 16 N. Y. 112, 123, 69 Am. Dec. 665.

By-law of pilots' association that one refusing to go on a boat in turn shall be considered on sick leave and have sick leave pay is not so unreasonable that it can be set aside. *Marshall v. Virden*, 19 Pa. Sup. Ct. 245, 251.

¹⁰ One claiming to be the legitimate successor of Dowie as head of his church sought an injunction against another making the same claim. Held: As no property rights are involved, equity will not interfere. *Lewis v. Voliva*, 154 Ill. App. 48, 51.

Quo warranto to inquire into the validity of the election of deacons of a church was dismissed because they were not officers of the church corporation but of an unincorporated association over the election of whom the courts have no control. The fact that they are by statute ex-officio trustees of the corporation does not give the State the right to interfere (Cooley, C. J.). *Attorney General v. Geerlings*, 55 Mich. 562, 22 N. W. 89.

Plaintiff sues to enforce his right to office of Grand — of — Order against another claimant. Contested election. Did not appear any salary attached to office. Held: Courts will not interfere with internal affairs of unincorporated associations unless act complained of was a violation of rules of order and plaintiff was thereby deprived of a civil or property right. *Gaines v. Farmer*, 55 Tex. Civ. App. 601, 119 S. W. 874, 877.

¹¹ Petition for mandamus by new treasurer to compel old treasurer of unincorporated social body to turn over books. Held: Denied because not duly elected. Notice of meeting not given to some of directors and the term of office of directors had not commenced. *Grand Rapids Guard v. Bulkley*, 97 Mich. 610, 57 N. W. 188.

Where an officer of a religious society is duly appointed for no definite term, the presumption is that he remains in office till competent evidence of his due removal is given, and whoever claims it on that ground must establish it. *Hendrickson v. Shotwell*, 1 N. J. Eq. 577, 600. Acc. *Tanner v. Ranken*, 89 N. Y. S. 770, 44 Misc. 488.

Election at a special meeting of which all were not notified was held illegal in a suit by an officer to recover possession of paraphernalia. *Goller v. Strubenhaus*, 134 N. Y. S. 1043, 1049. Acc. *Whitty v. McCarthy*, 20 R. I. 792, 36 Atl. 129 (fraternal order).

¹² *Goesele v. Bineler*, 14 How. 589, 608 (communistic society);

meeting can bind a majority of a subsequent meeting by

Bouldin v. Alexander, 15 Wall. 131, 140 (church); *Foreman v. Fayer-son*, 135 La. 221, 65 So. 131. *Hetchett v. Mt. Pleasant Church*, 46 Ark. 291, 295 (injunction against preacher dismissed by majority vote). *Trustees v. Proctor*, 66 Ill. 11 (injunction refused where majority voted to retain preacher). *Turpin v. Bagby*, 138 Mo. 7, 10, 39 S. W. 455 (trustees elected by majority faction in Baptist church retained property). *Fair v. First Church*, 57 N. J. Eq. 496, 501, 42 Atl. 166 (majority of Methodist church voted sale of edifice). *Conference v. Allen*, 156 N. C. 524, 72 S. E. 617 (removal of trustees of a Congregational church). *Windley v. McCliney*, 161 N. C. 318, 77 S. E. 226 (majority of Baptist church adopted "discipline of a certain conference." No change in doctrine); *Henry v. Deitrick*, 84 Pa. St. 286, 294 (church); *Horton v. Chester Baptist Church*, 34 Vt. 309, 317 (agreement to compromise a will).

By the constitution of an unincorporated church the management of its affairs was vested in the "whole" congregation. Held: This meant a meeting at which all had an opportunity to attend, but not that unanimous consent be requisite. The church being congregational in polity and independent could act by a majority and so amend its constitution (at least if it worked no change in the purpose of the organization) and may incorporate. *Duessel v. Proch*, 78 Conn. 343, 349, 62 Atl. 152.

Majority excluded by a minority are not seceders if they organize separately. *Bates v. Huston*, 66 Ga. 198, 200.

Where a church is strictly independent questions of doctrine or form of worship are to be decided by a majority of members or by any local officers or tribunal created by the church for the purpose. Where elders are elected for that purpose, instrumental music cannot be introduced in the service against their will without some action by the majority in accordance with the rules. *Hackney v. Vawter*, 39 Kan. 615, 629, 18 Pac. 699.

A church which had never formally adopted any confession of faith but for years had sent delegates to a District Synod adhering to the belief of one sect of denomination had a right to elect a pastor who adhered to the belief of the other sect and a minority could not restrain him from acting as such or from using the church property. *Ehrenfeld's Appeal*, 101 Pa. St. 186.

Where majority rule was agreed upon in the constitution which united two religious congregations a minority cannot thereafter claim title to any part of the real estate owned by the association, but having been allowed to build a separate church on a part of the land and occupy it for years the original congregation are estopped in equity to assert their title. *St. Paul's Church v. Hower*, 191 Pa. 306, 311, 43 Atl. 221.

At the close of the Civil War a minority of a congregation for political reasons excluded the majority. The issue was on joining the North or South branch of the Presbyterian church. Held: The minority is not the church and could not arbitrarily exclude the majority or act as the church thereafter. *Deaderick v. Lampson*, 58 Tenn. 523, 534.

A majority of a lodge formed a new one. Then voted most of funds

irrepealable acts or rules of procedure.¹³ The meeting must follow due notice in accordance with the by-laws.¹⁴ The common parliamentary rules in use by deliberate assemblies in this country should be resorted to, in the absence of any made by the association itself, in considering the regularity of its proceedings.¹⁵ If the associa-

of old as back salaries to secretary and treasurer, who later loaned it to new lodge. Held: Majority cannot divert funds of lodge. Action of lodge in paying bills will not be scanned closely but will be given great weight if done in good faith. Here it was a mere subterfuge to divert funds. *Bachman v. Hofman*, 104 Ill. App. 159, 183.

An oral vote of which no record is kept is insufficient to ratify an unauthorized conveyance of property. *Hubbard v. German Catholic Soc.*, 34 Ia. 31, 39.

¹³ *Richardson v. Francetown Union Cong. Soc.*, 58 N. H. 187, 189. *Acc. Goesele v. Bimeler*, 14 How. 589, 608, and *Smith v. Nelson*, 18 Vt. 511, 550.

In a church having a congregational form of government two factions arose over questions of doctrine. At a meeting of the church one faction agreed to sell its interest in the church to the other. At a later meeting before this was done a majority of the congregation voted to rescind the former action. Held: The majority rules and the second meeting had power to set aside the former action. Such vote was a good defense to action on the contract. Action need not be by a majority of all the members, a majority of those attending is sufficient if all have an opportunity to attend. *Bottom v. Tinsley*, 134 S. W. 833.

¹⁴ When the canon of an Episcopal church required notice during divine service of an election of vestrymen, a notice given at a service held by one claiming to have been elected rector, which service was held at an unusual hour, is insufficient. *Dahl v. Palache*, 68 Cal. 248, 9 Pac. 94.

Action for salary by a dismissed pastor against trustees of a church. Held: He cannot object to the notice given of the meeting that dismissed him because he advised that it be held, gave notice of it and participated in it. *Helbig v. Rosenberg*, 86 Ia. 159, 164, 53 N. W. 111.

A church society was composed of pew holders. Though the constitution required fourteen days' notice of a meeting the rule had not been complied with for many years. It was not complied with in calling a meeting which voted to move the church building to another town. Held: The vote as taken was invalid. Query, if a valid meeting could have authorized the change against the will of pew holders. *Small v. Cahoon*, 207 Mass. 359, 364, 93 N. E. 588.

¹⁵ An appointment by a religious society of an agent to receive its share of a fund for religious purposes must be by vote and not by signature of the individual members. *State v. Trustees*, 11 Ohio 24, 28.

When the term of office of trustees of a church has not expired and

tion has no rules, it may adopt rules at any meeting.¹⁶ If it adopts by custom rules contrary to the usual par-

they have not resigned, a new election held on the announcement of the chairman that their offices were vacant is void. *Bristor v. Burr*, 12 N. Y. St. Rep. 638 (Sup. Ct.).

Informal association to raise money to build a soldiers' monument. A minority, including president and treasurer, refused to abide by vote of majority as to its application and withdrew from the meeting. A successor president was elected and the old one brings bill to enforce his right to the office. Held: He had no vested right in the office. As there were no rules of the association there was no definite tenure of the office of president and a new one could be elected at the pleasure of the association. In order to pass upon its rights and powers, as well as those of its members, "both the law of corporations and the law of co-partnership are to be resorted to, in the absence of satisfactory regulations, the choice being determined by the nature of the feature under consideration." *Ostrom v. Greene*, 161 N. Y. 353, 360, 55 N. E. 919.

It was held that the constitution of an association of churches contemplated that a majority of the members present at any regular meeting should govern the association, even though they are a minority of the whole body. Hence contrary action of a majority at an irregular meeting did not prevail. "A voluntary association has no existence or power except as contained in its formal articles of agreement or established by custom acquiesced in by the parties to it. When the association consists, as here, of the annual meeting of delegates from its constituent members — the churches — to further certain common interests, the organization is dissolved upon adjournment into its individual elements until reassembled pursuant to the common agreement." *Kerr v. Hicks*, 154 N. C. 267, 268, 70 S. E. 468.

In a church organized on the strictly Congregational principle the will of a majority must govern and that must be expressed in the ordinary mode at the meetings of the church, not by holding separate unauthorized meetings and purporting to depose existing officers. *Long v. Harvey*, 177 Pa. 473, 480, 35 Atl. 869.

When a motion to adjourn is declared adopted by the moderator of a Congregational church and some remain and reorganize the meeting and thereafter two separate organizations are maintained, that which in fact had a majority will be deemed the original church and entitled to its property. The announcement of the result of the vote by the moderator is not binding if clearly false and fraudulent. *Gipson v. Morris*, 31 Tex. Civ. App. 645, 647, 649, 73 S. W. 85.

They must act at a meeting and not by signed petition. *Barton v. Fitzpatrick*, 65 So. 390 (Ala.).

¹⁶ Farmers' telephone line. "But this association had no constitution, rules or by-laws. At any meeting duly held it had a right to adopt such rules as it saw fit, except that it could not do an illegal act or adopt any measure subversive to the object for which it was formed." "It is not the province of the courts to pass upon the wisdom or fairness of the policy indicated in the resolution, so long as it attempted nothing subversive to the purpose for which the association was organized."

liamentary rules, they are equally binding.¹⁷ The State will, of course, punish an illegal act even if done in accordance with the by-laws of a voluntary association to which the victim has assented¹⁸ and the courts will not enforce a penalty for refusal to do an illegal act.¹⁹

Branagan v. Buckman, 122 N. Y. S. 610, 67 Misc. 242, aff'd 130 N. Y. S. 1106, 145 App. Div. 950.

¹⁷ By the customs of the society of Friends decision is not made by a majority vote or by any vote, but by the recording by the clerk of the "sense of the meeting." The clerk has the right to open the meeting. Hence when a majority of a meeting attempted by force to deprive him of that right and he withdrew with others and organized the meeting elsewhere, a treasurer appointed at the latter meeting and duly recorded by the clerk was legally entitled to the office and a payment made by the defendant to him was good payment of the note in suit. *Field v. Field*, 9 Wend. 394, 401. *Acc. Earle v. Wood*, 8 Cush. 430, 454.

In a controversy as to the marketability of a title which had passed through the trustees of an unincorporated society of Shakers it was contended that it did not appear that the trustees acted with the consent of the ministry and elders evidenced by vote at a formal meeting. It did appear that consent had been obtained informally. Held: Since not organized under some act of legislature the society was unincorporated and could make its own rules of action. Title did not vest in all the members because of a statute empowering its trustees to hold title. Since it was never the custom of the society to act in formal meetings, this must be accepted as their own interpretation of the "covenant" which forms their constitution and so there was no need of a formal vote to authorize the conveyance. *Feiner v. Reiss*, 90 N. Y. S. 568, 98 App. Div. 568.

¹⁸ *State v. Williams*, 75 N. C. 134 (initiation ceremony).

¹⁹ An employers' association cannot enforce a penalty on a member for refusal to obey an order to employ only members of a particular labor union because such order is against public policy and void, because it operated generally through the community and might prevent craftsmen from getting work at their trade. *McCord v. Thompson-Starrett Co.*, 113 N. Y. S. 385, 129 App. Div. 130.

Action on bond given by a member of an employers' association on joining to obey orders of association as to relations with employees. In a strike the association decided not to employ men unless they signed an arbitration agreement and so notified defendant. He disobeyed and was sued on bond. Held: Bond valid, and so was association. Purpose was stability in building trades. Defendant bound by rules of association he joined. *Trust, etc. Co. v. Waldhauer*, 95 N. Y. S. 222, 226, 47 Misc. 7.

§ 59. "Ultra Vires"

There is a tendency to apply to non-profit associations the phrase *ultra vires*, borrowed from the law of corporations. This gives much comfort to those who contend that the common law recognizes the existence of associations as something distinct from their members. Thus a trade union was forbidden to apply its funds to pay election expenses or to maintain labor members of parliament because outside the objects expressly or impliedly included in the act legalizing their existence,¹ and this conception was applied in the Free Church case.² The phrase has been used occasionally in cases in this country,³ and the essence of the doctrine has been applied in many cases. Most of them, however, were suits for control of property of the association, and as we shall see presently were explained by an application, somewhat forced, of the doctrines of the law of trusts.⁴ In a few cases the conception of the court seems to have been that of *ultra vires* and it is submitted that this is the correct principle.⁵

¹ *Amal. Soc. v. Osborne*, (1910) A. C. 87.

Brett, L. J., used the term *ultra vires* with reference to expulsion from a social club in *Dawkins v. Antrobus*, L. R. 17 Ch. D. 615, 630.

² See § 61, note 32.

³ *Everett v. First Presbyterian Church*, 53 N. J. Eq. 500, 510, 32 Atl. 747.

The installation of an exchange was said to be not *ultra vires* for an informal farmers' telephone association. *Francis v. Perry*, 144 N. Y. S. 167.

⁴ See § 61.

⁵ When no writing defines their powers, a majority of those who attend any meeting have a right to decide, but they must keep within the scope of the object of the association. "As in partnerships and corporations, the majority can only govern within the object for which the partnership or corporation was formed." Association to hire military substitutes. *Abels v. McKeen*, 18 N. J. Eq. 462, 465.

"At common law every participant in a voluntary society has the absolute right which the court will protect of having its property con-

§ 60. Property

The problem of adapting our individualistic law of real property to the needs of associations has seemed as difficult of solution in the case of non-profit associations as in that of partnerships, — the States dividing on the questions in about the same way. In most jurisdictions the rule is that an unincorporated association cannot in its aggregate capacity take title to lands in grant. "A valid grant to such a community can only be made to the individuals composing it or to an individual and his heirs in trust for its use."¹ "A grant to such association *eo nomine* would pass no title."² So a reservation for the benefit of an association is void.³ The reason given for declaring invalid deeds to associations is that they are void for uncertainty.⁴

trolled and administered according to its organic plan and to participate in its affairs in harmony therewith." But under statute a religious society had right to incorporate against will of some. *Temple v. Vincent*, 127 Wis. 93, 105 N. W. 1026, 1028.

¹ *Goesele v. Bimeler*, 5 McLean 223, 10 Fed. Cas. No. 5503 (partition of property of socialistic community) aff'd in 14 How. 589; *Gewin v. Mt. Pilgrim Church*, 166 Ala. 345, 51 So. 947 (church); *East Haddam Church v. East Haddam Soc.*, 44 Conn. 259 (bill to set aside a conveyance. Plaintiff was unincorporated association. "As such they are not the legal owners of the property in question and by the law of this State cannot own real estate"); *Jackson v. Cory*, 8 Johns. 385, 388 (ejectment of land conveyed to the "people of" a county, not incorporated); *Liggett v. Ladd*, 17 Ore. 89, 95, 21 Pac. 133 (bill to enforce a conditional limitation).

Deacons of an unincorporated church cannot as such claim title by prescription to a spring used for baptismal purposes. They hold no office recognized by secular courts. "The church society collectively, being unincorporated, was without capacity to acquire or hold title." *Stewart v. White*, 128 Ala. 202, 208, 30 So. 526.

² *Attorney General v. Federal St.*, 3 Gray 1, 44; *German Land Ass'n v. Scholler*, 10 Minn. 331, 338 (bill in equity to enforce trust *inter vivos*). See also *Reding v. Anderson*, 72 Ia. 498, 34 N. W. 300.

³ *Hornbeck v. Westbrook*, 9 Johns. 73, 74 (land conveyed subject to a proviso for the benefit of the inhabitants of a town, not incorporated).

⁴ *Hornbeck v. Westbrook*, 9 Johns. 73, 74.

Property may, however, be acquired by trustees for the benefit of an unincorporated association,⁵ if this is not obnoxious to the rule against perpetuities.⁶ A conveyance in trust for an unincorporated association is not a public charity. Those who take the equitable interest are capable of ascertainment.⁷ Where a fund is raised by contributions of members for a specific purpose, a subsequent decision of a majority of the members to apply it for a different purpose can be enjoined by minority contributors and equity will enforce the original trust.⁸ When a fund is raised by contributions of members not for the benefit of some specific beneficiary, but to acquire certain property, title to which is taken in the name of some individual

⁵ *Mendenhall v. First Church*, 177 Ind. 336, 98 N. E. 57; *Earle v. Wood*, 8 Cush. 430, 445; *Attorney General v. Federal St.*, 3 Gray 1, 44; *Martin v. Board*, 149 Wis. 18, 134 N. W. 1125.

An unincorporated church is without capacity to hold legal title. An agreement to convey to trustees for it did not create a charitable use. Yet chancery has jurisdiction over such associations and their property because of the trust nature of their property and will compel conveyance under the contract to a church corporation formed by the majority. *Gewin v. Mt. Pilgrim Church*, 166 Ala. 345, 51 So. 947.

A treasurer of an unincorporated church holds as trustee for the church its funds raised for the support of the poor and for other church purposes. *Weld v. May*, 9 Cush. 181, 189.

⁶ Thus a gift in trust for an unincorporated religious society is not obnoxious to the rule against perpetuities which prevent alienation because the entire interest at any time is represented by known living persons; that is, the legal estate by the trustees and the equitable interest by those persons who then constitute the association, who may be ascertained according to its rules governing membership. *Old South Society v. Crocker*, 119 Mass. 1, 23.

⁷ The custom of permitting the public to attend worship in a church does not divest the association of its private character or its right to exclude the public. *Attorney General v. Federal St.*, 3 Gray 1, 49, 50; *Old South Society v. Crocker*, 119 Mass. 1, 23.

The several associations are so far entities that they are represented in court by members who answer for themselves and all other members. *Mannix v. Purell*, 46 Ohio St. 102, 141, 19 N. E. 72.

⁸ *Leatherman v. Wolf*, 240 Pa. St. 557, 566, 88 Atl. 17 (money raised by an association for a national orphan home of a fraternal order. Majority voted it for a local home).

without any trust expressed, he will hold it as trustee for the association. If by the rules of the association, however, it is to be held free from trust, there is no reason why those rules should not be accepted by the courts. The usual presumption of intent of the donors is obviously not applicable. Thus if the property of a Catholic congregation bought by its contributions, the legal title to which is vested in its Bishop under the rules of the church, is free from the control of the congregation, it is not properly described as a trust fund held for the benefit of the congregation.⁹ So where the fund is raised to build a church for a particular society, the fact that some of the contributors are not members of the association does not in the absence of agreement deprive the association of its control of the property.¹⁰ Any beneficiary, however, may proceed in equity to compel the trustee to execute the trust, and so a member of an association as an individual if he can establish the existence of a trust impressed upon its property of which he is a beneficiary, may sue to enforce it,¹¹ but not for partition of the property pur-

⁹ *Hennessey v. Walsh*, 55 N. H. 515.

Contra. *Fink v. Umshied*, 40 Kan. 271, 19 Pac. 623; *Mannix v. Purcell*, 46 Ohio St., 102, 136, 19 N. E. 72. See *Heiss v. Vosburg*, 59 Wis. 532, 18 N. W. 463.

A fund raised by a Catholic congregation for a specific object and entrusted to the priest is impressed with a trust that the congregation can enforce. *Amish v. Gelhaus*, 71 Ia. 170, 174, 32 N. W. 318.

¹⁰ *Busby v. Mitchell*, 23 S. C. 472, 476.

Contra. *Avery v. Baker*, 27 Neb. 388, 397, 43 S. W. 174.

An unincorporated guild formed to promote the interests of an incorporated church obtained permission from the latter to build an addition to the church and raised money for it. The fund was contributed to by members of the church and by other church organizations. Held: The guild acquired no title in the addition which was on property of the corporation and could not control the disposition of it. *Reed v. St. Ambrose Church*, 137 Pa. St. 320, 20 Atl. 1002.

¹¹ *Nash v. Sutton*, 117 N. C. 231, 233, 23 S. E. 198 (religious society).

At a public meeting subscriptions were taken for a church to be

chased.¹² If there is more than one trustee, they take as joint tenants, and there is survivorship on the death

used by all visitors and others at a summer resort. Held: A bill to enforce the trust may be brought by one within the designation of beneficiaries alleging that the trustees had allowed it to be used exclusively for one denomination. It could not be brought merely by a contributor to the charitable trust. *Ludlam v. Higbee*, 11 N. J. Eq. 342, 347.

The session of a Presbyterian church brought a bill for an accounting against the trustees of the property who had placed in the parsonage a pastor not approved by the presbytery to which the church belonged. Held: Though the trustees were by statute a corporation holding the legal title, the beneficiaries were the members of the congregation, an unincorporated association, and the plaintiffs as members of the congregation are beneficiaries and entitled to bring this bill (p. 506). The session as such is merely a committee of the congregation to deal with spiritual affairs and has no title in the property in its official capacity (p. 507). But it has the right to determine what use of the church edifice is contrary to the creed, and a member in minority has the right to come into court and prevent a use thus determined to be improper (p. 510). But here there was no breach of trust, because all members of the congregation acquiesced in the action of the trustees now complained of and so are estopped (p. 519). *Everett v. First Presbyterian Church*, 53 N. J. Eq. 500, 32 Atl. 747.

Where several religious denominations contributed to the expense of building a church and keeping it in repair on the agreement that it was to be used by all without interfering with each other, but that the Wesleyans were to have the preference as to the time of use, the other denominations can enforce their right to use it against the Wesleyans. *Williams v. Church*, 193 Pa. St. 120, 44 Atl. 272.

A loosely formed committee to raise money to erect a statue, of which defendant was a member, practically abandoned its purpose. The defendant went ahead on his own responsibility and had the statue erected, using for it some money he had raised for the former project. Fourteen years after abandoning the work two survivors of the old committee met and purported to assign to plaintiff the money the defendant originally collected. Held: Neither the committee nor the plaintiff could call defendant to account. Only the original subscribers could do that. *Doyle v. Reid*, 53 N. Y. S. 365, 33 App. Div. 631.

Members of a club may sue in equity to compel a retiring treasurer to turn over to his successor a silver tobacco box belonging to the society which had a sentimental value. *Fells v. Read*, 3 Ves. Jr. 70.

¹² An unincorporated church organized an unincorporated association which raised money for a school which was incorporated. The association retained only the right to elect trustees. Held: Individual churches have no title in the property of the corporation which enables them to petition for its partition. *Spring Green Church v. Thornton*, 158 N. C. 119, 122, 73 S. E. 810.

of one, but *inter vivos* all must join in a conveyance.¹³ The trustees are the proper ones to bring suit to protect the trust estate.¹⁴ When trustees are appointed by the court they and their successors, duly appointed, are the proper ones to carry out the trust.¹⁵ A surviving trustee having legal title may maintain ejectment against the agents of the church.¹⁶ Because only a legal title is subject to a mechanic's lien, such a lien could not be established on a church, title to which was vested in trustees when the contract out of which the claim arose was with the church society.¹⁷ The trustee in the first instance may determine the use of the property held in trust.¹⁸ Whether he can convert real estate into personalty depends on the terms of the trust.¹⁹ A rep-

¹³ Hence all must join as plaintiffs on a writ of entry to foreclose a mortgage, *Webster v. Vandeventer*, 6 Gray 428, 429, or to assign a mortgage, *Austin v. Shaw*, 10 Allen 552.

When members of an unincorporated club within a church raise money to buy property for the church, title to which is taken by a trustee, but the church later declines to accept it, the bishop has no right to interfere with a sale of the property by the trustees for the club. *Eis v. Croze*, 149 Mich. 62, 73, 112 N. W. 943.

A church cannot claim title to land conveyed to its trustees in consideration of an agreement by its stewards that it always be kept open without ratifying the agreement. *French v. Barre*, 58 Vt. 567, 5 Atl. 568.

¹⁴ *Unangst v. Shortz*, 5 Whart. 506, 523 (church); *Wolfe v. Limestone Council*, 233 Pa. 357, 82 Atl. 499 (lodge).

A bond and mortgage made payable to "S, Secretary of Baltimore Agricultural Aid Society," may be enforced by him personally, rejecting the descriptive words. The legal interest had vested in him. *Sangston v. Gordon*, 22 Gratt (Va.) 755, 763.

¹⁵ *Crawford v. Nies*, 220 Mass. 61.

¹⁶ Though they had managed the property for the church for years, their control had not been inconsistent with the trust and therefore not adverse to the plaintiff. *Burrows v. Holt*, 20 Conn. 459, 465.

¹⁷ *Peabody v. Eastern Methodist Soc.*, 5 Allen 540.

¹⁸ *Prickett v. Wells*, 117 Mo. 502, 504, 24 S. W. 52 (choice of pastor).

¹⁹ A devise to a religious society to build a meeting house thereon gives a fee and the trustees may sell and apply the proceeds to that purpose. *Griffitts v. Cope*, 17 Pa. St. 96, 100.

The legislature has power to authorize trustees of a religious society to convert into personalty, real estate held in trust for the society which

resentation by a trustee that the trust estate was liable for his debts will not bind the beneficiaries.²⁰ The association as such cannot pass title to property held in trust for it.²¹

Election of new trustees by the association does not of itself divest the title of the old trustees.²² Transfer of the equitable interests of beneficiaries will be an equitable defense to ejectment by the successor in title of the trustee.²³ A lease to an association has been held binding on the lessor because the lessee's officers who signed in its name were personally bound.²⁴ There are numerous decisions that incorporation of an unincorporated association *ipso facto* transfers to the corporation title to the property of the association.²⁵ The explana-

cannot otherwise be conveyed. *Re Van Horne*, 18 R. I. 389, 394, 28 Atl. 341.

²⁰ *Mannix v. Purcell*, 46 Ohio St. 102, 138, 19 N. E. 72 (church).

²¹ *Austin v. Shaw*, 10 Allen 552 (assignment of mortgage); *East Haddam Church v. East Haddam Soc.*, 44 Conn. 259 (deed).

Land was conveyed to an Episcopalian bishop in trust for the wardens, vestry and congregation of a certain church which was not incorporated. Later the vestrymen of the church executed a mortgage on it. Held: Since the church was unincorporated the trustee was more than a passive trustee and was the only person authorized to execute it. Since the mortgage was without his consent, it was void. *Hill Estate Co. v. Whittlesey*, 21 Wash. 142, 145, 57 Pac. 345.

²² Mechanic's lien for repairs cannot be enforced unless the contract is enforceable against the surviving trustee. *Peabody v. Eastern Methodist Soc.*, 5 Allen 540.

²³ Equitable defense *pro rata* where only part of the equitable interest was acquired. *Douchitt v. Stinson*, 73 Mo. 199, 201.

Under a Pennsylvania statute all property held in trust for a church shall be subject to the control of the congregation. Held: A vote of a congregation placing title in the bishop free from such control will not be enforced. *Mazaika v. Krauczunas*, 233 Pa. St. 138, 153, 81 Atl. 938; *Novicis v. Krauczunas*, 240 Pa. St. 248, 87 Atl. 646.

²⁴ Hence there was consideration for lessor's covenant of quiet enjoyment. *Reding v. Anderson*, 72 Ia. 498, 34 N. W. 300.

²⁵ *Reorganized Church v. Church of Christ*, 60 Fed. 937, 941 (C. C. — Mo.) (beneficial interest in property held in trust).

Legal title of trustees. *Sanchez v. Grace M. E. Church*, 114 Cal. 295, 46 Pac. 2; *Happy v. Morton*, 33 Ill. 398, 413; *Dubs v. Egli*, 167 Ill. 514, 47 N. E. 766; *Christian Church v. Church of Christ*, 219 Ill. 503,

tion has been made that this is the result of an act of legislature and that the legislature has power to do it,²⁶ but it would seem rather that it is the result of the voluntary act of the association accepting the act of incorporation.²⁷ It seems clear that incorporation by a minority is insufficient to pass the title.²⁸ An association already in existence cannot be prevented from using its name by a corporation later organized with a similar name.²⁹

76 N. E. 703; *Baptist Church v. Witherell*, 3 Paige 296, 299; *Attorney General v. Dublin*, 38 N. H. 459, 575. Hence the corporation can recover the funds on deposit in a bank. *North Church v. McGowan*, 62 Mo. 279, 288.

Where the majority faction of a church incorporated, it incorporated both factions or the whole church, and transferred the church property to it. *Holm v. Holm*, 81 Wis. 374, 384, 51 N. W. 579.

²⁶ Reformed, etc. *Church v. Mott*, 7 Paige 77, 82.

²⁷ Grand Lodge of Illinois sought to incorporate and consolidate with another similar one by special act of legislature. Held: "The rights of the parties to this controversy to the funds and property in question depend upon the law of the Order D. O. H. and not upon any act of the legislature of Illinois." *Alchenburger v. Lodge*, 138 Ill. App. 204, 207. See query in *Craig v. Inhabitants of Franklin County*, 58 Me. 479, 492.

²⁸ *Happy v. Morton*, 33 Ill. 398, 413; *Henry v. Deitrick*, 84 Pa. St. 286, 294.

²⁹ A lodge of K. of P. seceded because it was forbidden to print ritual in German as before and formed Improved K. of P., incorporated. Plaintiff is Supreme Lodge K. of P. and is a corporation. It seeks to enjoin defendant from using that name. Held: Incorporation does not give exclusive right to name already in use by an existing voluntary society. Rights of the order not violated because no evidence of intent to deceive by use of similar name or that it does in fact deceive. *K. P. v. I. K. P.*, 113 Mich. 133, 135, 71 N. W. 470, 38 L. R. A. 658.

Dissatisfied members of an unincorporated society cannot by incorporating under the same name bring bill to enjoin original society from using that name on ground that it deceives the public. *Black Rabbit Ass'n v. Munday*, 21 Abb. N. Cas. (N. Y.) 99, 103.

Injunction allowed in suit by member of an unincorporated association against a corporation of same name to prevent it from using that name. One of purposes of the association was to give dramatic entertainments and it was well known in that capacity, and defendant in appropriating the name caused damage. This does not affect charter powers. Defendant may go on under another name. Fact that statute says corporation shall not take name of existing corporation does not imply that plaintiff cannot maintain this suit. *Aiello v. Montecalfo*, 21 R. I. 496, 44 Atl. 931.

A peculiar form of title is that of pew owners in churches in many of the States. They are seldom identical with the membership in the association and seldom form a separate association. Their relations to the church are usually several. They are not tenants in common of the building, but have a usufructuary interest in it which is ended only by a destruction of the church which is inevitable or reasonably necessary.³⁰ Burial rights are sometimes similar.³¹

As a logical consequence of the rule regarding title to real estate it is held that a devise to an unincorporated association is void.³² It is said that the associa-

³⁰ *Jones v. Towne*, 58 N. H. 462; *Church v. Wells*, 24 Pa. St. 249, 251; *Barnard v. Whipple*, 29 Vt. 401; *O'Hear v. De Goesbriand*, 33 Vt. 593, 606. See *Attorney General v. Federal St.*, 3 Gray 1, 45.

A religious society that has had undisputed possession of property for forty years may pass title to it in accordance with its vote. Pew owners have only a right of occupancy subject to the superior right of the society owning the pews. It is a qualified ownership subject to superior title. *First Presbyterian Soc. v. Bass*, 68 N. H. 333, 337, 44 Atl. 485.

A pewholder's right is usufructuary only and is ended when the church is destroyed by fire. *Witthaus v. St. Thomas Church*, 146 N. Y. S. 279, 161 App. Div. 208.

A pew owner holds subject to the established usages of the denomination and a usage that deprives him of all right in the proceeds of sale of the church when it becomes too poor to further maintain worship is binding. It was assumed that he knew of the usage. *Huntington v. Ramsden*, 92 Atl. 336 (N. H.).

³¹ *Dwenger v. Geary*, 113 Ind. 106, 121, 45 N. E. 183; *St. John's Church v. Hamns*, 31 Pa. St. 9.

³² *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58 (yearly meeting of Quakers); *Brewster v. McCall*, 15 Conn. 274, 294 (missionary society); *Marx v. McGlynn*, 88 N. Y. 357, 376 (Catholic society); *Barker v. Wood*, 9 Mass. 419 (devise to part of the members of a parish).

By statute a church society was made a corporation to the extent and for the purpose of taking a devise, otherwise "incapable in its collective capacity of taking any estate in land." *Hamblet v. Bennett*, 6 Allen 140, 145.

See *Ryam v. Bickford*, 140 Mass. 31, 32, 2 N. E. 687, where a deed *inter vivos* to an association was held to vest title to the land in its members as tenants in common.

A devise to an unincorporated church is void and a provision for suspension of the gift until it incorporates does not help it. *Washburn v.*

tion as a body is incapable of taking and that it was not intended that the members should take as individuals.³³ The next step was to hold that bequests of personal property to an association are void.³⁴ Even where the devise or bequest is to the association in trust for charity it has been held void.³⁵ It has even been held that a trust for the benefit of an unincorporated asso-

Acome, 131 N. Y. S. 963, 967, aff'd 136 N. Y. S. 1150, 151 App. Div. 948.

³³ *Greene v. Dennis*, 6 Conn. 293, 299 (devise to the "Yearly Meeting of the People called Quakers").

³⁴ *State v. Warren*, 28 Md. 338, 352; *Owens v. Methodist Soc.*, 14 N. Y. 380, 385; *Re Compton's Will*, 131 N. Y. S. 183; *Riley v. Diggs*, 2 Dem. Surr. 184, 189 (N. Y.); *Ely v. Ely*, 148 N. Y. S. 691, 707 (App. Div.); *McKeon v. Kearney*, 57 How. Pr. 349, 353; *Leonard v. Davenport*, 58 How. Pr. 384, 386; *Reeves v. Reeves*, 73 Tenn. 644, 647; *Bible Soc. v. Pendleton*, 7 W. Va. 79, 86.

A decision of the question was avoided in *Tucker v. Seamen's Aid Soc.*, 7 Met. 188, 200, because that will contained this clause: "My wish is, in all cases in this will, where any sum is given to any society or voluntary association not incorporated, that the same shall go to the treasurer, for the time being, of such society or voluntary association, for the purposes of such society respectively, and that the receipt of such treasurer for the same shall be a sufficient discharge." Shaw, C. J., said that the treasurer of a voluntary society was as capable of being identified as any other individual and the trust upon which he was to take was indicated with equal certainty.

See an early case which held a bequest in trust for charity a valid trust in the then members. *Bartlett v. King*, 12 Mass. 537, 540.

While it seems probable in Massachusetts that a bequest as well as a devise to an association will be upheld as vesting in the members as individuals, it will be wise to follow the form considered in *Tucker v. Seamen's Aid Soc.*, if only to spare the executor the problem of securing receipts from all the members.

³⁵ *Philadelphia Baptist Ass'n v. Hart*, 4 Wheat. 1, 28 (devise to society in trust for persons to be selected by the society) (statute of Elizabeth respecting charities was not in force in Virginia); *Owens v. Methodist Soc.*, 14 N. Y. 380, 385; *White v. Howard*, 46 N. Y. 144 (devise to charitable society to aid indigent Southern churches); *Pratt v. Roman Catholic Orphan Asylum*, 46 N. Y. S. 1035, 1036, 20 App. Div. 352; *In re Waterford Y. M. C. A.*, 47 N. Y. S. 854, 22 App. Div. 325; *Chili Soc. v. Bowen*, 21 Hun 389; *Carpenter v. Westchester County Historical Soc.*, 2 Dem. Surr. 574, 575 (N. Y.); *Sherwood v. Am. Bible Soc.*, 1 Keyes 561, 567 (N. Y.) 4 App. Div. 227, 234; *Betts v. Betts*, 4 Abb. N. C. 317, 403 (N. Y.).

But see *contra*, *Bartlett v. King*, 12 Mass. 537, 540 (vesting title in members as individuals).

ciation is unenforceable because the beneficiaries cannot be ascertained.³⁶

Some States have been more liberal.³⁷ It has been held that a bequest to an association vests in its members as individuals,³⁸ and that since the association cannot act as trustee the trust will be enforced by appointment of another trustee.³⁹ In Vermont an association, though unincorporated, may take a trust for charity.⁴⁰ In Maryland, where the statute of Elizabeth is not in force, an ingenious way was invented to get along without it.⁴¹ It has been held that an unincorporated

³⁶ *Downing v. Marshall*, 23 N. Y. 366, 382 (devise in trust for a missionary society).

A trust for the Methodist Episcopal Church of the United States (which is not incorporated) is too indefinite to be enforced and is void, though a local society of the church had used the property for years. *Little v. Willford*, 31 Minn. 173, 17 N. W. 282. *Acc. Trustees v. Trustees*, 84 Md. 173, 35 Atl. 8; *Carskadon v. Torreyson*, 17 W. Va. 43, 107 (in these cases the form of deed was that recommended by the church discipline).

³⁷ Held: Property devised to an unincorporated church as a perpetual fund, the income to be paid in a specified manner, is a trust which the church because unincorporated cannot administer, but property given for immediate expenditure — as in completing a church building — can be taken by the church in its own name. There is no objection to paying it to the person who ordinarily receives and keeps the funds of the church (p. 192). The other devise is not void, but the heirs take the property subject to the trust and it will be enforced by a court of equity (p. 197). When given to trustees named in the will they take title. *Johnson v. Mayne*, 4 Ia. 180.

A New York bequest to an unincorporated church in Massachusetts is valid because by statute in Massachusetts such church associations are empowered to take such bequests. *Congregational Unitarian Soc. v. Hale*, 51 N. Y. S. 704, 707.

A devise to an unincorporated religious society in trust for the repair of church buildings and for the extension and promotion of a certain faith, is a donation for religious purposes and not a gift to or for the use of the particular church designated as trustee. *Glover v. Baker*, 76 N. H. 393, 402, 83 Atl. 916.

³⁸ *Guild v. Allen*, 28 R. I. 430, 434, 67 Atl. 855.

³⁹ *Guild v. Allen*, 28 R. I. 430, 434, 67 Atl. 855; *Heiskell v. Lodge*, 87 Tenn. 668, 673, 11 S. W. 825.

⁴⁰ *Burr v. Smith*, 7 Vt. 241. At least, if it is a religious society by virtue of the State constitution. *Smith v. Nelson*, 18 Vt. 511.

⁴¹ A bequest to a corporation for any of its authorized agencies is

lodge issuing a benefit certificate may be designated as the beneficiary.⁴²

As to the title to personal property of an association, it has been said that it is vested in the individual members,⁴³ but that one who leaves the association abandons his interest in the property and those who remain succeed to it.⁴⁴ How this differs from title in the associa-

valid though the beneficiary be an unincorporated association. The donation is regarded in such case as made to the corporation, not in trust, but upon condition that it be applied to the particular corporate use, unless the purpose to create a trust be clear. Thus it avoids objection of perpetuity and uncertainty.

Though a gift by will to an unincorporated association is void because it can become effective only by the aid of the law, a gift *inter vivos* is different because it is an act *in pais*. As far as the donor is concerned it is complete. *Snowden v. Crown Cork & Seal Co.*, 114 Md. 650, 80 Atl. 510, 512.

⁴² The assured and those claiming under him are estopped to question its capacity to take. *Bacon v. Brotherhood*, 46 Minn. 303, 48 N. W. 1127.

⁴³ Trespass for removal of a building transferred to plaintiff by deed of a committee authorized by vote signed by all members of a fire company. *Curtiss v. Hoyt*, 19 Conn. 154, 167.

A conveyance of land to a religious society before incorporation vested title in the members of the society in trust for the church and for the religious purposes it represented. *Apostolic Union v. Kundson*, 21 Idaho 589, 594, 123 Pac. 473.

An indictment for larceny from a body of persons not incorporated should be laid as the property of the individuals comprising the body and not of the company. *Wallace v. People*, 63 Ill. 451.

Unincorporated labor union. One who gets assignment pursuant to vote of rights from all members in good standing of claims for misappropriation of funds may sue even if he has not assignment from members suspended who have a conditional right of reinstatement. *Brown v. Stoerckel*, 74 Mich. 269, 276, 41 N. W. 921, 3 L. R. A. 430.

"Their ownership of property is of the same intermediate character. It partakes of the qualities of both the others, the title being for many purposes joint and several like that of partners or joint tenants, while the right of possession is joint only as in corporations. Where the question of the right of present possession arises, it must be decided by the constitution and by-laws of the association or in the absence of any sufficient provision therein for such a case, by the majority." *Liederkrantz Singing Soc. v. Germania Turn-Verein*, 163 Pa. St. 265, 268, 29 Atl. 918.

⁴⁴ *Curtiss v. Hoyt*, 19 Conn. 154, 167.

A society on tontine principle issued bonds of several classes with provision for redemption out of seventy per cent. of payments for later

tion is hard to understand. The more satisfactory rule would seem to be that title is in the association. That is the law of associations for profit. In accordance with this view it has been held that title is in the association,⁴⁵ that when a group of members secede from the association, even though they are a majority, they lose all interest in its property,⁴⁶ that members had no right

bonds. Theory of redemption was that some would default on payments and rest win thereby. Held: Such contracts not illegal, but plaintiffs cannot bring creditors' bill for receiver merely alleging they are bondholders. Does not appear that they are all of one class. Cannot be said from the bill that any of complainants are entitled to anything. "It applies the principle of joint tenancy to the investments of the subscribers, the survivorship depending upon default instead of death." *Union Invest. Ass'n v. Lutz*, 50 Ill. App. 176.

The fact that a local union withdrew from a national union and affiliated with another was said to have no effect on its identity as affecting property rights. *Shipwright's Ass'n v. Mitchell*, 60 Wash. 529, 111 Pac. 780.

⁴⁵ An unincorporated association can claim property being sold on execution by a sheriff as well as if it were incorporated. *Lavretta v. Holcombe*, 98 Ala. 503, 12 So. 789.

Individual members of a church cannot convey a right of way over its land. Individual members of a church representing it may enjoin a trespass on its property. *Macon Co. v. Riggs*, 87 Ga. 158, 13 S. E. 312.

A minority of members of a church who disliked the pastor installed by the majority sought partition of the property of the church as tenants in common. Held: The land was bought for the church and title taken in the name of the unincorporated association. A statute says that "private societies" are capable of acquiring estates. The rule of the majority prevails on questions of church government that are not doctrinal and the minority have no property right that entitles them to partition. *Le Blanc v. Lemaire*, 105 La. 539, 542, 30 So. 135.

"A member of a stock exchange has merely the enjoyment and use of it while he is a member and the property remains with and belongs to the body while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation and not in the pewholder; and when the body ceases to exist those who may then be members become entitled to their proportionate share of its assets." *White v. Brownell*, 2 Daly 329, 356 (N. Y.).

⁴⁶ *McLaughlin v. Wall*, 81 Kan. 206, 105 Pac. 33; *Alchenburgs v. Lodge*, 138 Ill. App. 204, 209; *Ahlendorf v. Barkons*, 20 Ind. App. 657, 659, 50 N. E. 887 (lodge); *McFadden v. Murphy*, 149 Mass. 341, 344, 21 N. E. 868 (lodge); *Hill v. Rauhan Aarre*, 200 Mass. 438, 86 N. E. 924 (lodge); *Schiller Commandery No. 1, U. F. M. v. Jaennichen*, 116 Mich. 129, 130, 74 N. W. 458; *Moore v. Telephone Co.*, 171 Mich. 388,

to sue for a dissolution and a distribution of its assets,⁴⁷ that members of an unincorporated church entering the church building for other than religious purposes are trespassers,⁴⁸ that a suit for restoration of rights in an association cannot be brought on the theory that they are tenants in common⁴⁹ and that no excise was due on a sale of whiskey by a club to its members because there was no transfer of title.⁵⁰ In another case it was said

399, 137 N. W. 241 (farmers' telephone line) (see § 54, note 11); *Manning v. Shoemaker*, 7 Pa. Super. Ct. 375, 382 (religious society).

Property held in trust for a Masonic lodge is not held for individual members belonging at time of deed but for lodge as an entity. Differs from business association. Members who leave forfeit right to benefit of trust. Those who remain if the lodge does not cease to exist are entitled to the benefit of the trust. *Minor v. Lodge*, 130 S. W. 893, 897 (Tex. Civ. App.).

Connecticut lodges which were set off from the jurisdiction of the Massachusetts Grand Lodge under a Connecticut Grand Lodge were not seceders because they took no voluntary action, so they did not lose their interest in the funds of the Massachusetts Grand Lodge. *A. O. U. W. v. A. O. U. W.*, 81 Conn. 189, 208, 70 Atl. 617.

⁴⁷ *Robertson v. Walker*, 3 Baxt. (Tenn.) 316, 318; *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98, 111 (Pa.).

⁴⁸ *Unangst v. Shortz*, 5 Whart. 506, 520.

In a church controversy, injunction is a proper remedy to prevent unlawful use of the church property by a faction of the congregation. *Richter v. Kabat*, 114 Mich. 575, 579, 72 N. W. 600.

A bill in equity by one faction of a church to enjoin another from using the church because the minister who preached to them was not duly elected was dismissed for want of jurisdiction. *Smith v. Charles*, 24 So. 968 (Miss.).

The losing party in a controversy over possession of church property was held not in equity chargeable personally for the value of the use and occupation of the church property during the time they were litigating to keep control of the society and its affairs. *Bouldin v. Alexander*, 103 U. S. 330, 335, 26 L. ed. 308.

⁴⁹ Property was given in trust for two congregations. The two united and used it as one. Later one of the original societies took possession of the church and excluded the other. A bill in equity for restoration to rights was brought on the theory that the plaintiffs were tenants in common. Held: The bill discloses that they are members of an association and not tenants in common. Hence their rights can be adjusted only in equity. "By reason of numbers and the character of the rights of the parties damages are unsuitable as a means of redress." *Kisor's Appeal*, 62 Pa. St. 428, 434.

⁵⁰ *Graff v. Evans*, 8 Q. B. D. 373.

that a fund raised by a fair and by contribution of members for a public purpose belonged to the association and was not impressed with a trust which the contributors could enforce.⁵¹ The funds in the treasury cannot be distributed among the members without unanimous consent.⁵² The issue has been raised in cases relating to the sale of liquor by clubs to members and the decisions are conflicting.⁵³

Though in most associations not organized for profit the property rights are unimportant, in cases arising out of the failure of the communistic experiments that have been tried in various places, the issues have involved substantial amounts. The cardinal feature of these societies is that the members contribute their labor and its products to the common fund in return for the obligation of support, but have no individual right in the fund. These agreements are legal and it follows that when a member voluntarily withdraws he forfeits all claim on the property of the association.⁵⁴

⁵¹ *Parker v. Oliver*, 198 Mass. 488, 84 N. E. 860.

"There is no law in Louisiana which prevents an association of individuals from acquiring property and holding it in common for their mutual benefit. And there is no law which prevents them from selling the same." *Michenor v. Reinach*, 49 La. Ann. 360, 362, 21 So. 552.

⁵² *Kalbitzer v. Goodhue*, 52 W. Va. 435, 440, 44 S. E. 264 (butcher's protective association).

⁵³ A sale of liquor in a club was not meant to come within the scope of the Licensing Acts. It was not a sale "at retail." The members who bought were also vendors as to their own shares. They could not have been sued for goods sold and delivered for the price. The general property in the goods was in the club. A "special" property was in trustees under certain rules. Other officers of the club had other "special" properties. *Graff v. Evans*, 8 Q. B. D. 373.

Delivery by a club through its agents of beer which was its common property to a member on credit or for cash which thereby became his separate property is a sale. *Marmont v. State*, 48 Ind. 21.

⁵⁴ A member of a communistic religious society who had withdrawn brought *indebitatus assumpsit*. He had contributed his property to the society and was to be supported by it. He did not get all the support he expected and the funds were used to feed strangers and new

The most recent case recognizes expressly that title to the common property is in the association,⁵⁵ but the

converts and all did not work equally hard to replenish the common stock. Held: No right of action. The society was not illegal. *Ruse v. Williams*, 14 Ariz. 445, 130 Pac. 887.

Bill by seceding Shakers for partition of property. Held: Bound by their covenants. The trust was valid since for a charity and not a perpetuity under the statute of Elizabeth. *Gass v. Wilhite*, 2 Dana (Ky.) 170, 172, 178.

A Shaker who subscribed to their agreement for community property and that no one withdrawing should have any claim against the society, withdrew and sued for fair value of his twelve years' services. Held: The agreement is valid and was knowingly signed by the plaintiff and he cannot recover. If it were invalid, he was party to illegality and so cannot recover. *Waite v. Merrill*, 4 Greenleaf 102, 117 (Me.).

A member who sought to recover for the value of his labor was held bound by laches, where he had waited fifty years after retiring from the society before suing. *Speidell v. Henrici*, 15 Fed. 753, 120 U. S. 377, 30 L. ed. 718, 7 S. Ct. 610.

A child who grew up in a communistic society at Zion on becoming of age signed articles which provided for community ownership and only right to support by members while living with the society. Also provided power of expulsion on certain terms. Plaintiff's husband was expelled and she followed him. She now prays for partition of her share in the common property. Held: The agreement was valid and bound her. She has received the consideration for her labor and if it were invalid, she as a newcomer could not claim title to the original fund which must revert to donors. Did not pass on question of forfeiture, etc. *Gaselys v. Separatist Soc.*, 13 Ohio St. 144, 154.

For a case relating to the right to exclude a member from the society, see *Nachtrieb v. Harmony Settlement*, Fed. Cas. No. 10003; *Baker v. Nachtrieb*, 19 Howard 126.

⁵⁵ A socialistic community with valuable land had been reduced to a few members by withdrawals. The eight remaining were about to convey the property to a corporation. Descendants of original contributors brought a bill claiming right in it by resulting trust. Held (majority of court): The agreements show a contribution of the property to the society as a society which has not yet been divided by common consent of members or by abandonment of purpose for which formed. Those who withdraw from the society have no rights which are transmissible or enforceable on dissolution of the society. *Schwartz v. Duss*, 187 U. S. 8, 24, 47 L. ed. 53, 23 S. Ct. 4, 103 F. 561, 43 C. C. A. 323.

Descendants of the original founder of the society claimed title to the property because the purposes of the society were impossible. The court affirmed the title by survivorship in the remaining members. *Everett v. Duss*, 206 Fed. 590, 608 (C. C. A. — Pa.).

Bill in equity for an account and partition of real and personal estate of a religious and socialistic community by an heir of a member who

New York court has held that title is in the continuing members as joint tenants.⁵⁶ The agreement is not a perpetuity.⁵⁷

It should be noted that the Uniform Partnership Act recommended by the Commissioners on Uniform State Laws in 1914 does not apply to non-profit associations and so will not reconcile the conflicting decisions as to the property of such associations.

§ 61. Property of Religious Associations

The litigation that has followed the bitter quarrels that so often degrade religious organizations usually died before the society was incorporated against the founder and head of the society. Members on joining signed the constitution, which provided for common ownership of all property. Held: There was no individual ownership in the property of the association. *Goesele v. Bimeler*, 14 How. 589.

⁵⁶ Plaintiff was member of socialistic community carrying on a canning business for which he was salesman. The covenant he had signed on coming of age required that if he lived outside the community he should turn over to it all his earnings, that any member could retire at any time, but thereby forfeited all right in the property of the society. Plaintiff disagreeing with policy of society went to work for rival cannery but declared that he retained his membership and right to return when he chose and that if he did so he would bring all his earnings with him, but that in meantime he would retain them. Later all business carried on by the society was turned over to a corporation in which members took stock. Society not formally dissolved. Members had voted that plaintiff had voluntarily withdrawn. Held: Plaintiff had voluntarily left the society and ceased to be a member, hence he has no right in the property or to claim that there has been a dissolution. His disclaimer of withdrawal is insufficient, for his work for a rival business was inconsistent with membership. The agreement regarding property was not illegal. "It was a joint holding of property by the adult members of the community with this qualification, that upon the death or withdrawal of a member no share or interest therein passed to him or his personal representatives, but they who survived or remained continued to hold jointly the entire property *in solidum*." "By the terms of the contract under which that estate was acquired, its duration was only co-existent with the duration of his membership." (The title to real estate had been held by trustees.) *Burt v. Oncida Community*, 137 N. Y. 346, 355, 33 N. E. 307, 50 N. Y. St. 722, 19 L. R. A. 297, aff'd 138 N. Y. 649, 34 N. E. 288, 53 N. Y. St. 24.

⁵⁷ *Goesele v. Bimeler*, 14 How. 589, 608.

has been concerned fundamentally with questions not peculiar to the law of unincorporated associations, but rather with applications of the law of trusts. Since religious organizations are usually unincorporated, and since the most important decisions on the subject have arisen out of schisms in unincorporated churches, it seems desirable to state the results of those decisions here and show their relation to the general law of non-profit associations.

To understand these cases it is essential to recall at the start certain fundamental principles which have influenced the courts in their decisions.

(a) Courts will not interfere in the internal affairs of unincorporated associations unless property rights are involved.¹

(b) Civil courts are not equipped to decide ecclesiastical questions.²

(c) Courts when forced to pass upon the internal affairs of associations are bound by decisions of a tribunal constituted by the laws of the association when within its jurisdiction, because in joining an unincorporated association a member agrees to submit to those laws.³

(d) Other things being equal, the majority rules in unincorporated associations.⁴

(e) When membership in an association ceases, whether by proper expulsion or voluntary withdrawal, all rights of the member in its property cease.⁵

¹ See § 58 and § 56, notes 19 *et seq.*

² *Moseman v. Heitzhusen*, 50 Neb. 420, 423, 69 N. W. 957 (vote by majority to change church affiliation. Dispute of factions over church property).

³ See § 56, notes 14 *et seq.*; § 58, notes 4 *et seq.*

⁴ See § 58, note 12.

⁵ See § 60, notes 44 *et seq.*

(f) Equity will enforce a trust on petition of one entitled to enforcement regardless of the opposition of trustees or beneficiaries.⁶

(g) Funds accumulated by subscription for a specific purpose are held in trust by the recipient for that purpose.⁷

(h) The majority of an association cannot without unanimous consent authorize acts outside the scope of the purposes for which it was originally organized.⁸

In the application of these principles to the issues in religious litigation courts inevitably have been influenced by their conception of the fundamental importance of doctrinal differences, though always vigorously protesting that they will not pass upon such questions. Thus when forced to deal with property rights involved in the laudable attempts of warring sects to unite and harmonize those differences in theology which our fathers claimed to understand, but which to the modern lay mind seem not worth understanding, some judges have conceived that where property is acquired without any express trust attached there is an implied trust that it be used only for the promotion of the religion professed by the congregation at the time of its acquisition. Others have felt that these doctrinal differences necessitated an application of the doctrine of *ultra vires*. Others have been glad to accept the decisions of the church itself as sufficient justification for the acts complained of.

Religious organizations are of two sorts, the congregational system, in which each church is practically independent, and the connectional system, in which each local church is subordinate to higher organizations,

⁶ See § 60, note 11.

⁷ See § 60, note 8.

⁸ See § 59.

usually culminating, in the United States, in a national body. The Supreme Court of the United States has laid down the rules which it would seem should be applied in litigation between factions in an unincorporated church, each seeking control of its material assets.

When property is given expressly in trust to support some particular doctrine, the congregation cannot by a change of views carry the property to the support of the new doctrine.

Where property is held by an independent church with no trust expressed except that it is for the use of the society, if there is a schism, the rights in the property must be determined, as in all associations. If their principle of government is the rule of the majority, then the numerical majority must control the property. If there are officers in whom are vested the power of control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority choosing to separately organize can claim no rights. Where property is acquired in any of the usual modes for the general use of a church which is itself part of a general organization of some religious denomination, so long as any existing religious congregation can be ascertained to be that congregation or its successor, it is entitled to the property. When this question has been decided by the highest tribunal in the church legal tribunals must accept that decision.⁹

⁹ *Watson v. Jones*, 13 Wall. 679, 723, 726.

Dietum in case of corporation that whether unincorporated or not, property conveyed to it for the support of a particular doctrine is held as a trust for that purpose which equity will enforce. When endowed as belonging to a particular sect or connection, it cannot break off from that. When not so described, it may change its relation provided there be no radical departure from the original faith. The property belongs

Trusts that are clearly expressed seldom trouble the courts.¹⁰ Perhaps for this reason cases involving express trusts for the support of a particular doctrine are few. There are cases of gifts to a church described as affiliated with a specific organization where the minority adhering to that affiliation was held entitled to control its property.¹¹ Trusts to permit preachers of a specific denomination¹² or certain members of a specified denomination¹³ to use it and trusts for a congregation in a

to those who act in accordance with the law of the church, though a minority. *Schnorr's Appeal*, 67 Pa. St. 138, 146. *Acc. Roschi's Appeal*, 69 Pa. St. 462, 468; *Ramsey's Appeal*, 88 Pa. St. 60, 63.

¹⁰ *Nance v. Busby*, 91 Tenn. 303, 313, 18 S. W. 874. (Decree of Lurton, J., in support of first proposition of *Watson v. Jones*.)

If a gift is to be made in trust to propagate any particular doctrine of Christianity it must be clearly declared. *Attorney General v. Federal St.* 3 Gray 1, 58. See *Nance v. Busby*, 91 Tenn. 303, 313, 18 S. W. 874.

¹¹ A conveyance was made to trustees for the use of the congregation of Methodist Protestants. Later the denomination tried to unite with the Methodist Episcopal Church South. A majority of the congregation voted to join the latter and claimed the property as against a minority adhering to the old congregation. Held: The majority are not beneficiaries of the trust because not belonging to the Methodist Protestant church. A statute attempting to authorize the majority to take over the church property is unconstitutional so far as it attempts to affect said trust. *Finley v. Brent*, 87 Va. 103, 108, 12 S. E. 228.

Upon a division in a Lutheran church that had been attached to H. Synod, complainants had voluntarily withdrawn and attached themselves to M. Synod. Held: Though a majority, they cannot claim to control property conveyed to the elders "for use as a church and controlled by the Evangelical Lutheran Church of the Holston Synod" (p. 183). A synod having once decided in favor of one faction, its executive committee had no authority to change that decision (p. 190). *Rodgers v. Bennett*, 108 Tenn. 173, 65 S. W. 408.

¹² *Feizil v. Trustees of German M. E. Society*, 9 Kan. 594, 597 (rule that only in matters relating to the temporalities of a church can courts interfere was affirmed. *Brewer, J.*, allowed mandamus).

¹³ A deed gave land to the Methodist Episcopal Church South for the use of its colored members. Many of them separated and organized the African Methodist Church. They were allowed to use the church for a time, but now a group of colored members of the former church sue for possession. Held: The trust must be enforced for the benefit of the petitioners. *Brown v. Moore*, 80 Ky. 443.

specified locality¹⁴ have been enforced against the will of a majority of the congregation.

The second proposition of *Watson v. Jones*, though, it is submitted, more consonant with sound reasoning, has not been generally accepted. The courts have repeatedly laid down the general rule that in congregational churches the will of the majority governs,¹⁵ but when they have had to decide which of two factions in such a church is entitled to its property, most of the courts have implied a trust for the support of the particular doctrine professed by the congregation at the time of its acquisition and have tried to determine which faction adhered to that doctrine.¹⁶ In one case the

¹⁴ A trustee of funds raised to support a church in a certain locality cannot use the funds for support of another church at a distance from it no matter how many of the congregation chose to move to the latter place. The original church having become incorporated can sue for an accounting. *Presbyterian Church v. Donnom*, 1 Dess. 154 (S. C.).

A gift to trustees for a certain religious society so long as it held a certain faith "and such as may succeed them forever holding the same principles" is not terminated when the original society changes its views and moves away, but the trust subsists for the benefit of any other society that may be formed holding the specified views. *Potter v. Thornton*, 7 R. I. 252, 264. See also *Goode v. McPherson*, 51 Mo. 126.

¹⁵ See § 58, note 12.

¹⁶ *White Lick, etc. Friends v. White Lick, etc. Friends*, 89 Ind. 136; *Hendrickson v. Shotwell*, 1 N. J. Eq. 577, 645; *True Reformed Church v. Iserman*, 64 N. J. L. 506, 43 Atl. 771; *App v. Lutheran*, 6 Pa. St. 201, 210; *Trustees v. Sturgeon*, 9 Pa. St. 321, 331. This same doctrine, being one of trusts, seems to apply equally to incorporated churches. *Bose v. Christ*, 193 Pa. St. 13, 44 Atl. 240; *Cape v. Plymouth Church*, 130 Wis. 174, 180, 109 N. W. 928; *Peace v. Christian Church*, 20 Tex. Civ. App. 85, 91, 48 S. W. 534.

A majority of a Baptist church expelled a minority. The dispute was over a technical question of theology. The church belonged to an association of churches. Both parties appealed to it and the minority was recognized. This decision was advisory only as the churches were congregational and independent. A dispute over the right to possess the church property brought the issue to court. The court below held that the church had always adhered to the doctrine now followed by the majority and that the majority were therefore entitled to the property. On appeal, Held: The property of a religious con-

suit was held barred by laches.¹⁷ In another the court refused to interfere with the decision of the church itself.¹⁸ Where doctrinal questions were not involved the decision of the majority was sustained.¹⁹ Many cases

gregation is dedicated to the original doctrine of that congregation and not even a majority can carry it over to a new doctrine (p. 378). "As well might it be contended that a banking corporation or association by a majority vote of its stockholders or directors could change its business from banking to insurance business or into that of a railroad company against the protest of a minority" (p. 379). It is only to decide property questions that courts consider issues of doctrine (p. 364). The decision of the Baptist Association on a question of doctrine, though advisory and not judicatory, must have a controlling influence in civil courts (p. 383). The majority doctrine was a departure from the original doctrine of the church as set forth in the original confession of faith and rules of decorum and the minority are entitled to the property. On a motion for rehearing the decision was reaffirmed. While majority rules on minor questions of discipline, it does not on fundamental questions of doctrine (p. 395). While no judicial inquiry can be made as to the expulsion of members by a church so long as it is done according to the law of the church, the question here is, who are the church (p. 407). Dissent by one on the ground that there was some evidence to sustain the finding of the court below. *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777.

In *Bouldin v. Alexander*, 15 Wall. 131, 140, the court said: "In a congregational church, the majority if they adhere to the organization and to the doctrines represent the church."

An unincorporated congregation may bring a bill in equity against the church corporation to enjoin diversion of the church property to a different faith. *Marien v. Evangelical Congregation*, 140 Wis. 31, 121 N. W. 604.

¹⁷ *Predestinarian Church v. United Church*, 139 Ky. 110, 129 S. W. 546 (nineteen years' delay).

¹⁸ Courts will not interfere with the decision of a Baptist church having congregational organization as to the use of the church by two factions. *Windham v. Ulmer*, 102 Miss. 491, 59 So. 810. See *Godmundson v. Thingvalla Church*, 150 N. W. 750 (N. D.).

¹⁹ *Hubbard v. German Catholic Soc.*, 34 Ia. 31, 35 (trust fund, raised for a parsonage, applied to debts).

A schism in a church on doctrinal points resulted in the expulsion of a minority by the majority and the organization of the minority, who claimed possession of the church property as representing the original doctrines accepted by the church at the time the property was acquired. Held: Both doctrines seem to be accepted by different churches of the denomination, so that it cannot be said that the majority by its change of belief has departed from the true doctrine and therefore no breach of trust has occurred (p. 520). The church is an independent congregation and therefore the majority rules and those excluded by vote of the church have lost all interest in the property as

have been disposed of by the settled rule that those whose membership in the association has been duly terminated have no rights in its property. Hence when one faction in a schism has seceded from the original church association and organized a distinct association not purporting to be the original church, the control of the church property has been awarded to those who could prove the identity of their organization with the original association.²⁰ Even where the seceders had been allowed for years to share the property it has been held that their rights were permissive only.²¹ This rule is equally applicable to connectional

beneficiaries. The court must accept the exclusion as valid (p. 522). *Bennett v. Morgan*, 112 Ky. 512, 66 S. W. 287.

A majority of a Baptist church may vote to move to another town and take with them all its property except property charged with a trust for its use at the original site, such as property raised by public contributions of the citizens of the town. A majority having dissolved the original church organization by the vote to remove, the minority have no right to bring an action at law with respect to such property. *McRoberts v. Moudy*, 19 Mo. App. 26, 34.

²⁰ This is the ultimate ground of decision in *Watson v. Jones*, 13 Wall. 679, 734. Acc. *Mack v. Krine*, 129 Ga. 1, 23, 58 S. E. 184; *Hadden v. Chorn*, 47 Ky. 70, 77; *Lewis v. Watson*, 67 Ky. 228; *Fuchs v. Meisel*, 102 Mich. 357, 373, 60 N. W. 773 (majority seceded); *Trustees v. Seaford*, 16 N. C. 453, 455; *Holt v. Downs*, 58 N. H. 170, 181.

Trustees may bring ejectment at law against a portion of the congregation who have formed a separate organization and taken possession of the property. *Fernstler v. Siebert*, 114 Pa. St. 196, 204, 6 Atl. 165.

Unless church factions so divide that each claims to be the original church, the courts will not interfere with disputes in congregational churches. *Stogner v. Laird*, 145 S. W. 644 (Tex.).

²¹ Seceding members of a church formed with others a new congregation. The new church was allowed by the old to use the church building part of the time for ten or fifteen years. Then it was refused and the old church brought a bill in equity to compel the new church to desist from using the building. Held: The new church had no contract right and the injunction should be granted. *Cahill v. Bigger*, 47 Ky. 211, 214.

Where seceders had been allowed for twenty-nine years to use alternately the old church edifice, their rights were permissive only and title remained in the original church, which is identified by its adherence to the original doctrines. Hence the new church could not restrain

churches.²² In Kentucky, where this litigation has been most prolific, the rule has been applied in cases of expulsion of a minority by a majority, and at the same time the court held that the action of the majority must be accepted by the courts as conclusive that those expelled were no longer members.²³ Since expulsion is usually resorted to in these controversies, this really begs the question, and, in its reasoning, this case is not likely to be followed. It has, however, been approved by the Supreme Court of the United States²⁴ and the result seems in accord with the doctrine of *Watson v. Jones*. By statute in Kentucky some of these cases have been disposed of sensibly by decrees providing for joint use of the church edifice where neither faction separately organized.²⁵

The third proposition of *Watson v. Jones* is that the property of a church which is itself part of a superior church organization is to be controlled by the organization which can be identified as the same branch of the parent organization and that the decision on this point

the old church from tearing down and replacing the church edifice. Appeal of Landis, 102 Pa. St. 467, 473.

²² *Godfrey v. Walker*, 42 Ga. 562, 571.

If the original congregation is kept up even by a minority they cannot be divested of the property by a separate organization of seceders. *Harper v. Straws*, 53 Ky. 48, 55; *McKinney v. Griggs*, 68 Ky. 401, 409.

²³ *Shannon v. Frost*, 42 Ky. 253, 258, 262. Followed in regard to parsonage acquired in the names of some of the majority who separated from the old church and the Methodist Church South. *McKinney v. Griggs*, 68 Ky. 401, 408. But an excommunication of a majority of a local church by a General Assembly without trial was held invalid and so the property was awarded to the majority faction. *Watson v. Garvin*, 54 Mo. 353, 381.

²⁴ "We must take the fact of excommunication as conclusive proof that the persons excommunicated are not members. But we may inquire whether the resolution of expulsion was the act of the church or of persons who were not the church and who consequently had no right to excommunicate others." *Bouldin v. Alexander*, 15 Wall. 131, 140.

²⁵ *Gartin v. Pennick*, 68 Ky. 110; *Poynter v. Phelps*, 111 S. W. 699.

of the highest tribunal of the church is to be accepted as final. This reduces the legal problem to one of identity and furnishes a simple solution, since in almost all such cases the church tribunal will have rendered a decision. Although there are a few decisions that seem opposed to it,²⁶ and some the effect of which is not clear,²⁷ most

²⁶ A bill to enforce a trust of church property. The church had withdrawn from the synod with which it had been connected. Held: The evidence did not establish that the property was held in trust to maintain a permanent connection with that synod. *Heckman v. Mees*, 16 Ohio St. 583, 589.

Held: That the connection of a Presbyterian church with a presbytery is voluntary and may be withdrawn, and hence that in this country if a Presbyterian church changes its religious connection, it does not forfeit its trust property. *Attorney General v. Federal St.*, 3 Gray 1, 54.

A Lutheran church changed its synod and a minority withdrew because of this and because of objection to certain doctrinal practices. They bring a bill to enjoin the majority from use of the church. Held: In the absence of some other established rule, it was sufficient that these changes were made by a majority. "The members of the society are not to be treated as partners entitled to a division of the property on a dissolution of partnership because of the dissatisfaction or withdrawal of a minority, but they are jointly associated for the common purposes; and as long as the property is appropriated to such purposes, and none are prevented from participating in such use thereof, there is no good reason why the views of the majority should not control in the management thereof in the absence of a different rule lawfully established or existing." *Schradi v. Dornfeld*, 52 Minn. 465, 473, 55 N. W. 49.

²⁷ Unless the usages of a church authorize the withdrawal of an individual church from the general organization without its consent, a minority adhering to the old church affiliation under such circumstances will be held entitled to the church property, but if the usages of the church are proved to permit such separation without mutual consent, the majority would be entitled to the property. *Vasconcellos v. Ferrara*, 23 Ill. 456, 27 Ill. 237. On another trial the evidence as to right of withdrawal was conflicting. Held: Regardless of the right to withdraw, both parties were beneficiaries before withdrawal and continued to be after it. Church ordered sold and proceeds divided *pro rata* between the two factions. *Ferraria v. Vasconcellos*, 31 Ill. 25, 53.

When persons join a church belonging to a general organization they assent to its laws and are entitled to the implication that the affairs of the church are to be managed according to them. When the general organization extends over several States, that in one State may refuse to obey the rest without being chargeable with secession (p. 14). "Union among churches is a perfectly legitimate part of their purpose and of their freedom and mutual concession is part of the natural law of it

cases are in accord.²⁸ This rule has been generally accepted in two series of cases that have come before the courts of many States, arising first from the dissensions over the revision of the confession of faith of the United Brethren,²⁹ and more recently from the union

which we cannot direct or limit" (p. 27). "Law deals with short periods in its administration and with individuals and societies under government and expects to find social unity continued without any violent rupture of forms or departure from principles and yet makes all reasonable allowances for development according to principles and with due respect for customary forms" (p. 29). The majority of a church that accepted a union of two church organizations was held not to have departed from the fundamental principle of its organization and is entitled to its property as against the minority (p. 29). *McGinnis v. Watson*, 41 Pa. St. 9.

²⁸ *First Presbyterian Church v. Wilson*, 77 Ky. 252, 268; *Simmons v. Allison*, 118 N. C. 761, 770, 23 S. E. 716; *Greek Church v. Greek Church*, 195 Pa. St. 425, 435, 46 Atl. 72; *Cape v. Plymouth Church*, 117 Wis. 150, 156, 93 N. W. 449.

A rector of a Protestant Episcopal church by virtue of his office has a right to enter into the church edifice, such right being in the nature of an easement. This is the law of the church, the effect of the contract made in giving him a call whether the church be incorporated or not. *Lynd v. Menzies*, 33 N. J. L. 162, 167.

²⁹ A national church organization revised its confession of faith. The members of one church in the denomination divided over the question and the minority claimed title on the ground that those adhering to the new confession had left the church. Held: The provision of the old constitution that amendment must be "on request of two-thirds of the whole society" is complied with though the bishop initiated the change and submitted the question to vote. Two-thirds of those voting is sufficient (p. 410). The decision of the church tribunal on matters of doctrine is conclusive on civil courts (p. 413). Equity will not interfere to enforce the trust of church property in such case unless the change in fundamental theological doctrine is clear (p. 415). *Kuns v. Robertson*, 154 Ill. 394, 40 N. E. 343. *Acc. Lamb v. Cain*, 129 Ind. 486, 513, 516, 29 N. E. 13. *Acc. (on the first point) Russic v. Brazzell*, 128 Mo. 93, 107, 109, 30 S. W. 526; *Schlichter v. Keiter*, 156 Pa. St. 119, 145, 27 Atl. 45.

Taft, J., agreed with the principles of the Illinois case, but overruled a demurrer to the bill in equity to enjoin interference with church property on the allegation that not sufficient notice of the time to vote had been given. *Brundage v. Deardorf*, 55 Fed. 839, 849 (C. C. — Ohio).

The constitution of 1840 of the United Brethren was adopted by the general conference without submission to the members. It was a voluntary limitation on its own authority, but it may be interpreted, when ambiguous, by the same body that created it (p. 223). The conference could determine the details of the procedure and amend the constitution (p. 225). The particular question here involved in the claim to the

of the Cumberland Presbyterian Church with the Presbyterian Church of the United States.³⁰ The General

property of the church is one merely of identity, that is, which is the legal successor of the organization to which the property was conveyed. As the highest church judicatory, the general conference decided that the new constitution had been legally adopted. Civil courts must accept that decision (p. 228). *Brundage v. Deardorf*, 92 Fed. 214 (C. C. A. — Ohio).

The later conference had the same power to change the constitution that the earlier one did to enact it. A constitution by acquiescence is unknown to American law, but the new constitution at least took effect as an ordinance of the church. *Horsman v. Allen*, 129 Cal. 131, 139, 61 Pac. 796.

The contrary result was reached in two States. Two-thirds of those voting did not comply with the rule. The law as to political elections does not apply (p. 452). The original constitution was binding (p. 442). The vote was not a request, and there being no request it was not valid (p. 454). The decision of the general conference was not a judicial decision but a legislative one, and so not binding on the courts. It did not apply a rule as to past actions but laid one down as to future actions (p. 459). *Philomath College v. Wyatt*, 27 Ore. 390, 31 Pac. 206, 37 Pac. 1022. *Acc. Bear v. Heasley*, 98 Mich. 279, 308, 24 N. W. 615 (by a divided court); *Lemp v. Raven*, 113 Mich. 375, 71 N. W. 627.

³⁰ The Presbyterian Union was held valid in *Sanders v. Baggerly*, 96 Ark. 117, 131 S. W. 49; *Harris v. Cosby*, 173 Ala. 81, 55 So. 231 (note curious use of the word "corporation" in the opinion); *Morgan v. Gabard*, 176 Ala. 568, 58 So. 902; *Permanent Committee v. Pacific*, etc. Church, 157 Cal. 105, 106 Pac. 395; *Mack v. Kime*, 129 Ga. 1, 25, 58 S. E. 184 (but see apparently contradictory statements on page 20); *First Church v. First Church*, 245 Ill. 74, 91 N. E. 761; *Ramsey v. Hicks*, 174 Ind. 428, 91 N. E. 344; *Bentle v. Ulay*, 175 Ind. 494, 94 N. E. 759; *Wallace v. Hughes*, 131 Ky. 445, 115 S. W. 684; *Carothers v. Moseley*, 99 Miss. 671, 55 So. 881; *First Church v. Cumberland Church*, 34 Okla. 503, 126 Pac. 197; *Brown v. Clark*, 102 Tex. 323, 116 S. W. 361; *Horton v. Smith*, 145 S. W. 1088 (Tex.).

Tennessee held the union of Presbyterian churches void on doctrinal grounds (majority). *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783. Such being the law, the property of a given church can be transferred to the Presbyterian church of the U. S. A. only by unanimous consent, i.e., by vote or by acquiescence for so long a time that an admission from conduct may be inferred. *Bonham v. Harris*, 125 Tenn. 452, 145 S. W. 169.

But since no rule of property is laid down by those cases the Federal courts in Tennessee are not bound to follow them and hold the union valid. *Sherard v. Walton*, 206 Fed. 562 (D. C. — Tenn.). *Helm v. Zarecor*, 213 Fed. 648, 656 (D. C. — Tenn.); *Sharp v. Bonham*, 213 Fed. 660, 669 (D. C. — Tenn.). So in Missouri the union was held invalid. *Boyles v. Roberts*, 222 Mo. 613, 121 S. W. 805. But *contra* in Federal court. *Barkley v. Hayes*, 208 Fed. 319, 333 (D. C. — Mo.). See also *Hayes v. Manning*, 172 S. W. 897 (Mo.).

Conference of the former and the General Assembly of the latter were the supreme judicial as well as legislative and executive bodies of their denominations. Their decisions which in each case represented the will of the majority of their communicants in most of the States were accepted as final, though frequently there were qualifications in the opinions which make it doubtful whether the doctrine of *Watson v. Jones* was accepted in its entirety. In two earlier cases regarding a schism in the Society of Friends this doctrine of *Watson v. Jones* seems to have been foreshadowed.³¹

In England the highest court has taken a different attitude towards this question. In the celebrated *Free Church of Scotland* case, one church desired to combine with another and modified the Westminster Confession to do it. A minority objected and claimed to

³¹ There may be such a departure from the principles of Quakerism as to destroy the identity of the society and leave its property derelict (p. 459). The court then considered the evidence and decided that the Yearly Meeting for New England had jurisdiction and had decided the question and their decision was followed (p. 470). *Earle v. Wood*, 8 Cush. 430.

A schism in the society of Quakers came before the court on a question of disputed election of a clerk and right to possession of church property. No question of doctrine seems to have been involved. Held: The former clerk should have taken the vote of the meeting on the election of his successor. "Civil courts in determining the question of legitimate succession in cases where a separation has taken place in a voluntary religious society, will adopt its rules and will enforce the polity in the spirit and to the effect for which it was designed. When public policy or the positive law of the land is not contravened the decisions and orders of the society, when made in conformity to its polity, should have the same effect upon the subject to which they relate, in civil courts, which the society intended should be awarded to them when pronounced by its own judicatories. If such society is composed of separate bodies, whether coördinated or subordinated, the rules of the society for the management of its internal affairs and for the adjustment of the relations between its branches constitute the law by which they should be governed." Hence the decisions of various yearly meetings as to the status of the Ohio Yearly Meeting were entitled to great weight and the one they recognized is held entitled to the trust estate. *Harrison v. Hoyle*, 24 Ohio St. 254, 286.

be the Free Church and entitled to its property. The House of Lords, overruling the Scottish court, held that it was *ultra vires* for any religious body to alter its fundamental principles and that the doctrine modified was of that nature and so the minority were entitled to the property. All counsel agreed that the question was one of contract and of trust springing from contract and the issue really was whether the original contract provided for authority of the Assembly to modify that contract.³² There are American cases to the same effect.³³

The doctrine of *Watson v. Jones* has no application to the decision of a merely advisory tribunal in a denomination organized on the congregational principle.³⁴

It is to be noted that in most of the cases above cited the tribunal itself interpreted the scope of its jurisdiction and that its decision on this in some cases was accepted as final by the civil courts. In one decision at least the court asserted the right to determine independently in all cases this question of the jurisdiction of the church tribunal.³⁵ This case was criticised in *Watson v. Jones*. The court said that the right of civil courts to question the jurisdiction of church tri-

³² *Free Church of Scotland v. Overtown*, (1904) A. C. 515.

³³ *Reorganized Church v. Church of Christ*, 60 Fed. 937, 953 (C. C. — Mo.); *Smith v. Pedigo*, 145 Ind. 361, 379, 33 N. E. 777, 44 N. E. 363.

³⁴ *Jarrell v. Sproules*, 20 Tex. Civ. App. 387, 395, 49 S. W. 904. See *Godmundson v. Thingvalla Church*, 150 N. W. 750 (N. D.).

³⁵ The order of a synod directing the election of additional ruling elders of a church was not an exercise of the appellate jurisdiction as a court of the church. It was not authorized by the constitution of the church to supersede the local session. Hence the ratification of its act by the General Assembly was unconstitutional and will not be recognized by the civil courts as a purely ecclesiastical decision or one within its jurisdiction affecting property would be. *Watson v. Avery*, 65 Ky. 332.

bunals applied only to attempts by church courts to deal with personal or civil rights not involving any ecclesiastical question and that if civil courts go beyond this they will be involved in questions they are unfit to answer.³⁶

When there has been a voluntary division of a church organization by proper authority neither organization can claim to be the original organization and each resulting church is entitled to a share in the property of the original association.³⁷ Where the original organiza-

³⁶ *Watson v. Jones*, 13 Wall. 679, 733.

³⁷ In 1844 the general conference of the Methodist Church adopted a resolution authorizing the Southern annual conference to set up as a separate organization. They did so and now sue for a *pro rata* division of the Methodist Book Concern, a fund for superannuated and other preachers established by contributions from the entire church. Held: The general conference had the power to make the division and neither part resulting is entitled more than the other to claim to be the original association (p. 306). The power was inherent in the general conference which originally founded the church (p. 307). There having been a division of the church by proper authority, that carried with it a division of the common property of the organization, including the Book Concern (p. 308). Nothing short of an agreement by the church South to surrender its rights in the Book Concern would preclude an assertion of its rights. Hence the fact that certain articles of the constitution were thought to interfere with a division of the Book Concern and that a plan was provided to get consent of all the conference to waive this, which plan was never executed, makes no difference (p. 309). Division ordered in proportion to the number of beneficiaries in each church at the time of separation. *Smith v. Swornstedt*, 16 How. 288. *Acc. Bascom v. Lane*, Fed. Cas. No. 1089 (C. C. — N. Y.).

Minor differences having arisen in a congregation, they divided and trustees of the original church conveyed an undivided half interest in the church property to trustees of the new church. Held: The trustees were authorized to make this division. The property had been acquired by contributions of the members. There was no secession, but a voluntary division. Having been acquiesced in for four years, it should not be disturbed. *Wicks v. Nedrow*, 28 Neb. 386, 388, 44 N. W. 457.

Two religious societies agreed on joint ownership of church school and burial ground. The land had originally been conveyed to trustees for one. They now seek partition. Held: While the trustees had no right to change the beneficiaries, the beneficiaries could themselves ratify such a change. The two associations, under Pennsylvania

tion decided that congregations in certain localities might choose which of the subsequent organizations they would affiliate with, the property of those congregations followed the determination of the majority.³⁸ Thereafter, however, they became subject to the laws of the branch with which they affiliated.³⁹

§ 62. Dues

Difficulties arise when an association attempts to collect dues by legal process. The problem was in substance declared insoluble in one case,¹ but the English

statutes, had many of the qualities of corporations. They became tenants in common and partition would be appropriate, but here denied in discretion of court because impracticable to sell the graveyard at auction. *Brown v. Lutheran*, 23 Pa. St. 495, 500.

³⁸ The Methodist Church divided into the Methodist Church North and the Methodist Church South and fixed territorial line but allowed the border churches to decide which general conference they would adhere to. Held: This was a valid act of the church and a majority of one of the border churches could decide to adhere to the Methodist Church South even if the Kentucky conference decided the other way. The minority having separated from the rest, have lost their right to use the church property. Deeds construed to refer to the church at that locality regardless of the conference adhered to. *Gibson v. Armstrong*, 46 Ky. 481, 527. *Acc. Humphrey v. Burnside*, 67 Ky. 215.

³⁹ *Brooke v. Schaklets*, 13 Grat. 301, 323 (Va.).

The Baltimore conference of the Methodist Church adhered to the Northern organization under the plan of separation of 1844. When the war broke out it voted to join the church South. Held: Property held in trust for its churches must be used for the benefit of churches that continued to adhere to the church North, because the plan of 1844 did not contemplate any further division after the first. *Hoskinson v. Pusey*, 32 Grat. 428, 436; *Venable v. Coffman*, 2 W. Va. 310, 324.

¹ Action by treasurer of cadets for fees and assessments. Members on joining corps signed articles of association promising to pay treasurer such fees and assessments. Held: Action cannot be maintained. It was not a promise to the plaintiff, but really a promise to the treasurer for the time being or the then treasurer or his successors. Such a promise cannot be enforced. No consideration, because it did not appear that the treasurer had incurred any expense on the faith of the promise. "The difficulty in this case arises from an attempt made to enable an association of individuals frequently shifting and changing

court did not hesitate to allow a representative of the association, designated by its rules for that purpose, to sue for arrears.² A different problem arises when the payment to be collected is not an assessment provided for by the rules of the association and assented to in advance by joining the association, but is merely a subscription made voluntarily for the purposes of the association. The problem in such cases belongs rather in the law of contracts than that of associations.³ A bill in equity against all subscribers who attended a public meeting was dismissed because the causes of action were separate.⁴

to have rights of succession and other attributes of a corporation." *Warren v. Stearns*, 19 Pick. (Mass.) 73, 76, 78.

² Plaintiff was master of the "Cocoa Tree Club." Rules required a subscription to be paid every year, and if no notice was given of an intention to discontinue they were to be considered members and the master was empowered to collect "house bills." Held: Every member must be considered debtor to the master for arrears unless he can show prior notice to discontinue. *Raggett v. Bishop*, 2 C. & P. 343, 31 Rev. Rep. 668, 12 E. C. L. 607. See also *Raggett v. Musgrove*, 2 C. & P. 556.

³ The trustees of a religious society which has never been incorporated may bring suit on a subscription made at a church meeting on Sunday by mutual promises though no payee is named in the subscription paper. *Allen v. Duffie*, 43 Mich. 1, 4, 4 N. W. 427, 38 Am. Rep. 159.

Action at law by the building committee of a church on a subscription by a member of a congregation. Held: In England the remedy would lie only in equity because the promise was to no particular person or persons by name. As equity jurisdiction has been restrained the court will waive technicalities and allow the action for the purpose of doing justice. *Chambers v. Calhoun*, 18 Pa. St. 13.

By statute the contract of a voluntary religious society with its members was made binding. A society sued in its association name a member on a subscription contract. Held: By failing to pay dues or ceasing to believe that religion he is not discharged from his contract. (Query, if corporation.) *Congregational Soc. v. Swan*, 2 Vt. 222, 229.

⁴ *Cheney v. Goodwin*, 88 Me. 563, 569, 34 Atl. 420.

A subscription to build a road payable to a designated "treasurer of the road fund" was a trust fund of which a receiver could be appointed on a creditor's bill, who could in the right of the treasurer and the other subscribers collect unpaid subscriptions. *Rousseau v. Call*, 85 S. E. 414 (N. C.).

There is apparent confusion in the decisions as to the right of an association to increase its dues without the consent of its members. It would seem that in the absence of contract rights of members, such as are involved in fraternal insurance, an association must have an inherent right to increase its dues if the increase is not retroactive. But it has been held in England that a social club cannot raise the dues of members without unanimous consent where the rules do not provide for action by a majority.⁵ As to contract rights, the question must be whether the by-laws are made part of the contract and whether the right to increase dues is reserved in the by-laws either under the power to amend or otherwise.⁶ After a benefit has accrued under such

⁵ *Harrington v. Sendall*, (1903) 1 Ch. 92. See *Wise v. Perpetual Trustee Co.*, (1903) A. C. 139.

⁶ Action on a benefit certificate. Defense that not member because did not pay assessments. Issue on validity of assessments modifying the original contract. Held: Invalid assessments because could not enforce the contract without consent of all contracting parties. "Not being incorporated its written articles of association constitute a contract by which the duties of its officers, the duties and obligations of its members among themselves and the scope of its business are to be defined and regulated. Its articles of association bear to it the same relation that a charter bears to an incorporated society and constitute its fundamental law, in accordance with which all subsequent by-laws, regulations and amendments must be made." *Hogan v. Pacific Endowment League*, 99 Cal. 248, 256, 33 Pac. 924.

Action on benefit claim. Defense, change in by-laws. Held: "It has been held in this court on more than one occasion that in respect to the by-laws of a voluntary association the court has no constitutional power, and cannot determine whether they are reasonable or unreasonable, and the only question it can examine is whether they have been adopted in the way which has been agreed upon by the members of the association." *Kehlenbeck v. Logeman*, 10 Daly (N. Y.) 447, 448. Acc. *Cuniff v. Jamour*, 65 N. Y. S. 317, 31 Misc. (N. Y.) 729; *Ulmer v. Muesler*, 37 N. Y. S. 679, 16 Misc. 42, 73 N. Y. S. 260.

An unincorporated mutual benefit association may amend its by-laws reducing the amount of an accrued benefit. By-laws may be amended by the enactment of changes of a mere regulative kind not inconsistent with the fundamental scheme of the association. *Marshall v. Pilot's Ass'n*, 18 Pa. Sup. Ct. 644.

Unincorporated benefit society incorporated after plaintiff's hus-

a contract no subsequent modification of the contract should be permitted so far as that payment is concerned.⁷ The contract involved in membership in these associations is to be interpreted like other contracts,⁸ and when the meaning is ascertained, is to be enforced, so long as not illegal or immoral, whether the court thinks it reasonable or not.⁹ Where the constitution of a union provided for the forfeiture of instalments of the initiation fee if false statements were made in the application, the court allowed the plaintiff to recover the amount when the statements objected to were as to her earning capacity.¹⁰

band became member, but apparently that made no difference. She claimed a benefit and objected to a change in by-laws reducing amount. Held: In nature of these assessment societies the rate may be changed, especially when it is provided that the by-laws may be amended. *Fugure v. Burlington St. Joseph's Mut. Soc.*, 46 Vt. 362, 370.

He cannot recover the benefits of the amendment and repudiate its obligations. *Berg v. Unterstutzungs Verein*, 86 N. Y. S. 429, 90 App. Div. 474.

⁷ *Poultney v. Bachman*, 10 Abb. N. Cas. (N. Y.) 252. See *Kehlenbeck v. Logeman*, 10 Daly 447, 448 (N. Y.).

⁸ The doctrine that a partnership may make its own laws and that these will be enforced by courts does not permit it to construe these contracts in other than their plain English meaning. *Wiggin v. Knights of Pythias*, 31 Fed. 122, 124 (C. C. — Tenn.).

⁹ Action for benefit against treasurer of labor union. Constitution provided that if in arrears three months, right was forfeited. It was claimed this proviso was unreasonable. Held: "Here the defendant is a voluntary association and the proviso is contained in the constitution subscribed by its members. That constitution is the contract between the parties, and if its provisions are not illegal, immoral or contrary to public policy it must be upheld whether reasonable or not, for parties have the right to enter into unreasonable or unwise contracts so long as such contracts are not illegal and are fairly made. This is the distinction between the case of a voluntary association and a corporation." *Hess v. Johnson*, 58 N. Y. S. 83, 41 App. Div. 465.

Unusual form of certificate of membership in a Board of Trade with membership fee and trust fund for redemption of certificates. Administrator of a deceased member could maintain bill in equity for redemption of the certificate by the association. *Halbert v. Traders' Exchange*, 173 Ill. App. 229, 233.

¹⁰ *Levin v. Cosgrove*, 75 N. J. L. 344, 67 Atl. 1070.

§ 63. Mutual Obligations of Members

It is said that one member of an association owes no fiduciary obligation to the others, such as one partner owes another.¹ On the other hand, a member has no right to sue for his share of the property of the association on the ground that its purpose has failed without joining all members in a final accounting as in partnership.² It has also been held that one member cannot

¹ Hence if he gets a lease of land the club had occupied for ten years for tennis court, he is not to be deemed trustee of it for the association. *Lumbard v. Grant*, 71 N. Y. S. 459, 1141, 62 App. Div. 617.

² Plaintiff at a public meeting of the Friends of Ireland contributed \$100 to the cause. Before the meeting a board of forty-eight directors had been chosen, who elected defendant treasurer. Defendant under advice of directors invested money in stocks. It had not been applied yet, but apparently purpose had not failed. Plaintiff sues for money had and received. Held: Plaintiff cannot recover. Money was received by directors, not by defendant. He was to pay it out on order of directors and so does not hold it on any trust for plaintiff. The money having been invested by order of directors, defendant has no money. Donations were to a common fund and even if plaintiff has right to a share in it on ground that purpose for which it was raised had failed, his right is only to his proportionate part after payment of expenses. This involves accounting to which all contributors are parties. Query, if defendant had any power of revocation before money was invested. *Murray v. McHugh*, 9 Cush. 158, 167.

Bill by members of an Odd Fellows Lodge against other members for a declaration that their exclusion from the lodge was illegal and for an injunction against application of funds of the lodge otherwise than according to its rules. Held on demurrer that the bill did not seek a dissolution that the only relief sought would not be granted without joining parties who would make the case unmanageable and that the court could not simply make a declaration of right. Demurrer sustained. *Clough v. Ratcliffe*, 1 De G. & Sm. 164, 180.

Plaintiff was a member of an Odd Fellows Hall Association formed to raise money to repair and furnish Odd Fellows Hall. Two thousand dollars was subscribed and transferable certificates for \$20 each issued to the contributors. Plaintiff held several shares. The money was spent for the purpose designated. The furniture bought was placed in the hall. The hall was now used by a new lodge, successor to the old. Plaintiff seeks to require the other members to buy his share, or to have the furniture sold and his proportionate share paid him. Held: There is no equity in the bill. It would be a violation of the original understanding and a breach of faith. *Robbins v. Waldo Lodge*, 78 Me. 565, 7 Atl. 540.

sue another at law on a contract of the association.³ As previously stated, courts decline to interfere in the internal affairs of associations unless property or civil rights are involved.⁴ A member of a mutual insurance association may bring a bill in equity against its officers to compel them to levy an assessment as required by his contract.⁵ Members who make advances for the association for work within the scope of the association may bring a bill in equity for contribution against the other members even though they did not expressly authorize it, but they must be members of a determinate association and not merely attendants at a public meeting.⁶ Statements made by a member regarding another in the course of the business of the association are *prima facie* privileged.⁷ Members are not liable

³ Association to build a meeting house. Held: One member cannot sue others at law for labor done. *Cheney v. Clark*, 3 Vt. 431, 435, 23 Am. Dec. 219.

A boating club contracted with the commodore to build a boat and paid him. It proved defective and he agreed to build another. Action at law by some of the members in own right and as assignees of other members, but not of all members apparently. Held: Though not strictly partners, "the rights of the associates in the property and the modes of enforcing them are not materially different from those of partners in the partnership property. "*Prima facie* the interest of each associate in the property and effects of the association is equal or proportionate. No associate has an interest therein which can be separated and taken out of the whole for his sole use until the joint affairs are settled, the association dissolved, the mutual rights of the members adjusted and the ultimate share of each determined." Hence no action at law against the defendant, a member. *McMahon v. Rauhr*, 47 N. Y. 67.

⁴ *Bennett v. Kearns*, 88 Atl. 806 (R. I.).

⁵ *Kimball v. Lower Columbia Ass'n*, 67 Ore. 249, 135 Pac. 877.

⁶ *Cheney v. Goodwin*, 88 Me. 563, 568, 34 Atl. 420. Apart from provisions in the rules, the trustees of an ordinary social club have a right of indemnity against individual members for money personally expended in paying club debts. *Wise v. Perpetual Trustee Co.*, (1903) A. C. 139.

⁷ Statements made by a member of an association to a superior officer about a matter of interest to the organization are privileged if made in

for enforcing the rules of the association.⁸ Courts of equity have jurisdiction of such cases because there is no adequate remedy at law. Mandamus is not the appropriate remedy to regulate the affairs of an unincorporated association.⁹

§ 64. Liability of Members

The striking distinction between associations for profit and non-profit associations is in the basis of liability of individual members for association obligations. All members of a partnership are personally liable for partnership debts. In the kind of association now under consideration, only those members are liable who

good faith. *O'Donaghue v. McGovern*, 23 Wend. 26, 31 (church); *Barbaud v. Hookham*, 5 Esp. 109 (military company); *Maitland v. Bramwell*, 2 F. & F. 623 (subscriber to charity to the committee of management) (but not if to other subscribers, *Hoare v. Silverlock*, 12 Q. B. 624; see *Martin v. Strong*, 5 Ad. & E. 535). So of statements to another member in the course of proceedings of the association. *Jarvis v. Hatheway*, 3 Johns. 180 (church); *Fairchild v. Adams*, 11 Cush. 549, 559 (statement by member of ministers' association as to reason for his vote); *Shurtleff v. Stevens*, 51 Vt. 511, 501, 515 (ditto); *Farnsworth v. Storrs*, 5 Cush. 412, 416 (reading sentence of excommunication); *Landis v. Campbell*, 79 Mo. 433, 440 (reading resolution); *Lucas v. Case*, 72 Ky. 297, 302 (report); *York v. Pease*, 2 Gray 282, 284 (defense at hearing); *Remington v. Congdon*, 2 Pick. 310, 315 (ditto. Defendant a non-member). So of publication of sentence in a church paper. *Redgate v. Roush*, 61 Kan. 480, 483. On the facts held not within above rules. *Shurtleff v. Parker*, 130 Mass. 293, 297; *Lovejoy v. Whitcomb*, 174 Mass. 586, 588; *Hocks v. Sprague*, 113 Wis. 123, 132; *State v. Bienvenue*, 36 La. Ann. 278, 383; *Gilbert v. Crystal Lodge*, 80 Ga. 284, 4 S. E. 905.

⁸ Plaintiff insisted on sitting at a camp meeting in the place reserved for women. He was removed and detained and brings action for false imprisonment. Held: The rules of the society were admissible in mitigation of damages. They may prescribe such rules as they think proper for preserving order at meetings. If after notice defendant refused to comply, they had the right to use necessary force to remove him. *McLain v. Matlock*, 7 Ind. 525, 528.

⁹ *State v. Cook*, 119 Minn. 407, 138 N. W. 432. See *Lahiff v. Ben. Soc.*, 76 Conn. 648, 57 Atl. 692. It was assumed to be the proper remedy in *Raych v. Hadida*, 130 N. Y. S. 346, 349, 72 Misc. 469. See § 56, note 28.

expressly or impliedly with full knowledge authorize or ratify the specific acts in question.¹

¹ *Matter of St. James Club*, 2 De G. M. & G. 383, 390, 16 Jur. 1075 (social club); *Wood v. Finch*, 2 Fost. & Fin. 447 (club to buy coal at wholesale for members); *Fleming v. Hector*, 2 Gale 180, 2 M. & W. 172 (ditto); *Delauney v. Strickland*, 2 Stark. 416, 3 E. C. L. 470 (social club); *Hawke v. Cole*, 62 L. T. Rep. n. s. 658 (navy mess); *Overton v. Hewett*, 3 T. L. R. 246, 248 (member of managing committee of club); *Fox v. Narramore*, 36 Conn. 376, 382 (military company); *Davidson v. Holden*, 55 Conn. 103, 112, 10 Atl. 515 (coöperative store); *Augusta Club v. Cotton States, etc. Fair Ass'n*, 50 Ga. 436, 442 (committee of arrangements of a fair); *Murray v. Walker*, 83 Ia. 202, 48 N. W. 1075 (assisting in holding a fair. Liable for prizes); *Schumaker v. Sumner Tel. Co.*, 161 Ia. 326, 142 N. W. 1034, 1037 (members of a farmers' telephone line not liable on a note in name of association); *Newell v. Borden*, 128 Mass. 31 (fire engine company. Vote at meeting); *Volger v. Ray*, 131 Mass. 439 (poultry association. Liability for prizes); *Ray v. Powers*, 134 Mass. 22 (ditto); *Ferris v. Thaw*, 5 Mo. App. 279, 286 (Masonic lodge); *Hammerstein v. Parsons*, 38 Mo. App. 332, 335 (benefit certificate); *Riffe v. Proctor*, 99 Mo. App. 601, 608, 74 S. W. 409 (church); *Hornberger v. Orchard*, 39 Neb. 639, 642, 58 N. W. 425 (social club); *Sizer v. Daniels*, 66 Barb. 426, 433 (political committee); *Hosman v. Kinneally*, 86 N. Y. S. 263, 43 Misc. 76 (see 90 N. Y. S. 357) (socialistic labor party. Action by employee of a newspaper conducted by trustees and supported by fixed contributions from members); *Lightbourne v. Walsh*, 89 N. Y. S. 856, 97 App. Div. 187; *Siff v. Forbes*, 119 N. Y. S. 773, 135 App. Div. 39 (loan to socialist labor party); *Devoss v. Gray*, 22 Ohio St. 159, 169 (trustees of a church); *Eichbaum v. Irons*, 6 Watts & S. 67 (Pa.) (dinner committee appointed at a public meeting); *Ash v. Guie*, 97 Pa. St. 493, 498 (Masonic lodge); *Winona Lumber Co. v. Church*, 6 S. D. 498, 503, 62 N. W. 107 (trotting park); *Arkins v. Dominion Live Stock Association*, 17 Ont. Pr. Rep. 303, 305 (club).

Business agent of a labor union made contract with plaintiff for use of union label which union later broke. He sued individual members of the union. Held: Cannot sue them as individuals. Hint that proper remedy is equity to reach funds of union. *Ehrlich v. Willenski*, 138 Fed. 425.

Members of a church signed a call to a pastor agreeing to pay him \$1,000 per year. He performed the services. The signers were held personally liable. *Thompson v. Garrison*, 22 Kan. 766. *Contra*, *Paddock v. Brown*, 6 Hill 530 (N. Y.). See *Neill v. Spencer*, 5 Ill. App. 461, 472.

After foreclosure of a church mortgage a bill was brought under the code to collect the balance of the debt from the members of the church without alleging their authorization of the indebtedness. Held: Bill dismissed. Such an association is not a partnership within the meaning of the code. Its members are not individually liable for its debts unless authorized or ratified. *First Bank v. Rector*, 59 Neb. 77, 79, 80 N. W. 269.

Action against a large number of members of an unincorporated

This rule has been strictly applied in a suit by a trustee of an unincorporated club against a member for indemnity against a liability on a lease incurred solely by reason of his acting in the capacity of trustee. The English privy council made an exception to the rule which it had previously laid down in regard to like actions by trustees of associations for profit,² and held that because of the rule that members of clubs incur no individual liability beyond their subscriptions unless they in fact authorize or ratify the act imposing the obligation, the trustee could not enforce a right to indemnity against the defendant merely because of the fact of membership.³

The fact that the defendant made payments on account as treasurer was held not ratification so as to

congregation of Roman Catholics on an account stated between a former priest represented by the plaintiff and his successor and others alleged to be authorized by the defendants to represent the congregation in such matters. Held: The liability is not based on partnership but on agency and the defendants are bound not because of membership but because of authorization or ratification. *Sheehy v. Blake*, 72 Wis. 411, 414, 416, 39 N. W. 479. Evidence was held sufficient to show authorization or ratification. *Sheehy v. Blake*, 77 Wis. 394, 399, 46 N. W. 537.

Action on a note given for church furniture sold by plaintiff. The note was signed individually by two who wrote after their names "Deacons Mount Carmel Church." The action was brought against them and the trustees of the church in their official capacity. Held: An unincorporated association cannot be sued as such. The members who incur the liability or later assent to or ratify it are liable as individuals. *Burton v. Grand Rapids Co.*, 10 Tex. Civ. App. 270, 31 S. W. 91.

In one case it was said that the liability was that of partners but because it was a non-trading partnership there was no implied authority to issue notes (farmers' telephone line); *Schumaker v. Sumner Tel. Co.*, 161 Ia. 326, 142 N. W. 1034. See similar loose language in regard to a religious community, *Teed v. Parsons*, 202 Ill. 455, 460, 66 N. E. 1044, and a college fraternity, *Korsted v. Williams*, 80 Wash. 452, 457, 141 Pac. 887. Members of a church have even been said to be "liable on its contracts as joint promissors or partners." *Thurmond v. Cedar Springs Church*, 110 Ga. 816, 36 S. E. 221.

² *Hardoon v. Belilios*, (1901) A. C. 118, 125.

³ *Wise v. Perpetual Trustee Co.*, (1903) A. C. 139, 149.

bind him as an individual member.⁴ Ratification by a national convention of a political party did not amount to ratification by the individual members of that party.⁵ The mere fact of membership and payment of dues is not enough,⁶ nor attendance at a meeting at which were read and approved the minutes of the former meeting that ratified the act of a committee.⁷ But knowledge that the plaintiff was performing her part of the contract was sufficient.⁸ Publication from time to time to members of a church of a liability to its pastor for unpaid salary and loans after an accounting with him was held sufficient evidence to warrant a finding of ratification.⁹ Of course if the contract was made before a member joined an association,¹⁰ or after he retired,¹¹

⁴ *Devoss v. Gray*, 22 Ohio St. 159, 169.

⁵ *Siff v. Forbes*, 119 N. Y. S. 773, 135 App. Div. 39.

⁶ *Lightbourne v. Walsh*, 89 N. Y. S. 856, 97 App. Div. 187 (association publishing a newspaper).

⁷ *Meriwether v. Atkin*, 137 Mo. App. 32, 37, 119 S. W. 36 (lodge).

Contract by a printer against members of a college class for printing of a volume on a written contract with A, who had been elected by the class business manager of the publication. There was evidence that the plaintiff gave credit to the class. Judgment for plaintiff. Held: "It was competent for the court to infer from all the evidence that the defendants who were present at the class meeting at which it was voted to publish a volume to be called 'The Brown and Blue' either voted to publish the volume or assented to the vote. This is true of the vote by which Arnold was elected 'business manager of the publication.' The contract made by Arnold was apparently within the scope of his employment, at least the court will so find." *Willecox v. Arnold*, 162 Mass. 577, 578, 39 N. E. 414.

⁸ *Heath v. Goslin*, 80 Mo. 310 (board of regents of a school).

Members of a lodge who attended meetings in a hall hired for it by its trustees without express authority must be held to have ratified the contract though they did not know the terms of the lease. "He may ratify by voluntarily assuming the risk without inquiry or he may deliberately ratify on such knowledge as he possesses without caring for more." *Ehrmanntraut v. Robinson*, 52 Minn. 333, 335, 54 N. W. 188.

⁹ *Sheehy v. Blake*, 77 Wis. 394, 399, 46 N. W. 537.

¹⁰ *Hornberger v. Orchard*, 39 Neb. 639, 643, 58 N. W. 425 (social club); *Barry v. Nuckolls*, 2 Humph. 324 (Tenn.) (dramatic society. Rent).

¹¹ *Rhoads v. Fitzpatrick*, 166 Pa. St. 294, 296, 31 Atl. 79.

he cannot be held to have authorized it. Cases which have talked loosely as though something less than authorization or ratification would suffice are not likely to be followed.¹² There are cases, however, where it was properly held that the purpose of the association was such that mere membership necessarily implied au-

¹² A citizens' meeting voted to continue a newspaper in Welsh and appointed J editor and authorized him to find a publisher who was to be guaranteed by the committee against loss to the extent of £300. J engaged plaintiff, but no formal guarantee was written. J saw the resolution. Held: Defendant who attended the meeting is liable. With the others he should bear the publisher harmless to the extent of £300. *Waterlow v. Cotton*, 2 Wkly. Rep. 562.

Action for price of a supper ordered by committee of arrangements appointed by a political club to get up a ball. Held: Though in ordinary cases of joint contract, if one defendant sets up denial of the joint contract plaintiff must prove the joint contract and hold him though other defendants have defaulted. "But when the contract is made on behalf of a firm or an association and the liability of the firm or association is proved, it is enough for the plaintiff to show that the persons who appear and defend are members of such firm or association and so are liable with the other defendants whose membership is admitted." *Downing v. Mann*, 3 E. D. Smith (N. Y.) 36, 46, 9 How. Pr. (N. Y.) 204.

An unorganized club without constitution or by-laws was held not a joint stock association under the New York statute. But it was said that all the members were liable to one who had furnished goods to it from time to time on the order of its steward, having never been notified that they had arranged to have the steward buy for himself and then sell to them. *Park v. Spaulding*, 10 Hun 128.

The members of a mutual benefit association are personally liable for the benefit provided by the court and by-law and because under statute beneficiary may sue the association by its officers. *Strauss v. Thoman*, 111 N. Y. S. 745, 748, 60 Misc. 72.

After Harrison was elected a meeting was held and appointed a committee to arrange a dinner. Held: He can recover. Non-joinder of others of committee not pleaded in abatement. Defendants were not agents of a club. "A club is a definite association organized for indefinite existence; not an ephemeral meeting for a particular occasion to be lost in the crowd at its dissolution." All defendants who concurred in the order are liable. Some who at first objected but finally yielded are still liable. "Every member present assents beforehand to whatever the majority may do and becomes a party to the acts done, it may be, directly against his will. If he would escape responsibility for them he should protest and throw up his membership on the spot." (Gibson, J.). *Eichbaum v. Irons*, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540.

thorization of contracts such as that in suit.¹³ Members who authorize or ratify are liable whether or not they intended to become liable or understood the law.¹⁴ If the plaintiff agreed that the members should not be individually bound, they are not liable,¹⁵ and likewise if it was agreed that the plaintiff should look only to a certain fund for payment.¹⁶ In equity the members

¹³ *Lawler v. Murphy*, 58 Conn. 294, 313, 20 Atl. 457 (benefit certificate); *Cheney v. Goodwin*, 88 Me. 563, 567, 34 Atl. 420 (association formed to bring a shoe factory to town); *Richmond v. Judy*, 6 Mo. App. 465, 468 (members of a campaign committee may be assumed to know that their association will incur expense for meetings); *Lynn v. Commercial Club*, 31 S. D. 401, 141 N. W. 471 (commercial club); *Ridgely v. Hobson*, 3 Watts & S. 118, 122 (Pa.) (members of association formed to run a public library are liable for books purchased by agent); *Cockerell v. Aucompte*, 2 C. B. N. S. 440, 3 Jur. N. S. 844 (club to buy coal at wholesale for members); But see *contra*, *Fleming v. Hector*, 2 Gale 180, 6 L. J. Ex. 43, 2 M. & W. 172, where it was said that express authority to buy on credit was necessary where a fund was provided for payment, even though defendant knew the coal was being bought. *Wood v. Finch*, 2 Foster & Fin. 447.

At a mass meeting a "Guarantee Committee" was organized to contract with a promoter to pay him \$70,000 to build a railroad. The contract was authorized and a sub-committee was appointed to borrow money to make the first payment. This was done. Later a constitution and by-laws were adopted and officers elected whose powers were limited, so that a vote of the association would be necessary to authorize them to borrow. They renewed their original notes at a different bank without such vote. The notes were signed by certain individual members of the association. Action against the makers of the note. Answer claimed contribution against all members of the association. Amended petition joined all members as defendants. Held: All members of the association were jointly and severally liable. The original note being authorized, its renewal by officers of the more formal association required no special authority. The makers had a right of contribution against the other members. Since the contract with the promoter was for the purpose of carrying out the very purposes of the association, when the work has been done it is too late to object that defendants were not present at the meeting at which a substituted contract was expressly authorized with a construction company. *Hardy v. Carter*, 163 S. W. 1003 (Tex.).

¹⁴ *Lawler v. Murphy*, 58 Conn. 294, 313, 20 Atl. 457 (benefit association).

¹⁵ *Heath v. Goslin*, 80 Mo. 310, 314.

¹⁶ *Lightbourne v. Walsh*, 89 N. Y. S. 856, 97 App. Div. 187. So where the plaintiff in fact knew at the time he performed services for the association, that its members with whom he contracted intended not

are held individually liable only after the joint assets are exhausted.¹⁷ Liability of a member once incurred is not terminated by withdrawal from the association.¹⁸ In two recent trade union cases it has been held that a contract made by the association is binding on individual members on the theory that it was made by impli-

to become personally liable, but that he be paid out of the association's funds, he cannot hold them individually. Attorney defending patent suits. *Burt v. Lathrop*, 52 Mich. 106, 17 N. W. 716; *McCabe v. Goodfellow*, 133 N. Y. 89, 95, 30 N. E. 728 (reversing 15 N. Y. S. 377) (attorney prosecuting for a "Law and Order" league); *Jones v. Hope*, 3 T. L. R. 247, note (C. of App.) (solicitor for a volunteer corps).

The rule applies even when the defendant is the contracting member.

Plaintiff sued defendant for repairs on a steamer which defendant had bought for the purpose of turning it over to an association being formed of which plaintiff and defendant were to be members. Held: Defendant was personally liable for the contract unless by agreement the plaintiff was to look to the association for payment. It is immaterial for whose benefit it was intended. *Wells v. Turner*, 16 Md. 133, 143.

A contract of a Baptist congregation with its minister construed to be a contract payable only out of a fund to be raised by voluntary contributions. Evidence of the custom of Baptist churches known to the plaintiff was properly admitted. *Riffe v. Proctor*, 99 Mo. App. 601, 609, 74 S. W. 409.

Individual members of an Odd Fellows Lodge are not liable to a fellow member for sick benefits, for the constitution and by-laws show that the payments are to be made by the lodge, not by its members. *Myers v. Jenkins*, 63 Ohio St. 101, 116, 57 N. E. 1089.

Defendant signed note as trustee of a religious society for a loan secured on specific property, the intention being that that property alone should be liable. Held: Defendant not personally liable, though it was not a corporation. *Elwell v. Tatum*, 6 Tex. Civ. App. 397, 401, 24 S. W. 71, 25 S. W. 434.

By statute in Pennsylvania members are not liable individually, but in an action against some in the name of the whole, they will be ordered to see claim paid out of the treasury. *Wolfe v. Limestone Council*, 233 Pa. St. 357, 82 Atl. 499.

A member of a committee to organize a railroad was sued by a surveyor employed by the committee with the approval of the defendant for pay for his services. There was a verdict for the defendant. Held: Properly left to the jury to decide whether under all the circumstances the agreement was that credit be given to the defendant or only to a fund to be raised. If the latter and the fund was raised, the agreement became absolute and the defendant would be liable. *Higgins v. Hopkins*, 3 Ex. 162, 167. See *Landman v. Entwistle*, 7 Ex. 632.

¹⁷ *Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938.

¹⁸ *Sizer v. Daniels*, 66 Barb. 426, 433 (political committee).

cation a term of the contract of employment of each individual member.¹⁹ Members of an association are not liable for the torts of a fellow member unless he had general authority to represent them in the matter.²⁰

¹⁹ The International Typothetae made a contract with the International Pressman's Union covering relations of members, strikes, hours, etc. Both unincorporated and representing local unincorporated associations. Action by individual members of local of former against officers of Ohio Union. Minority of Union did not approve of this controversy. Not all members of Union work for members of Typothetae or *vice versa*. Dictum, that contract though in form made by two international bodies was really a contract between each member of a local of the Typothetae who had members of the Union in his employ and those members, so that it became the terms of the separate contracts of employment. All members of Typothetae not indispensable parties. But contract invalid for lack of authority or ratification by Union of acts of its officers. *Barnes v. Berry*, 169 Fed. 225, 228, 94 C. C. A. 501.

An agreement between a railroad and a union fixing runs and rates of pay to be in force two years is a usage and not a contract. As such it becomes an implied term of the contract of employment of a workman. There was nothing in it about the period of service of employees, and so that period would be indefinite and could be terminated by either party at any time. Hence discharged employee cannot recover for loss of time after his discharge. *Hudson v. V. N. O., etc. Ry.*, 152 Ky. 711, 718.

But see *contra*, *Hudson v. Cincinnati Co.*, 152 Ky. 711, 154 S. W. 47. A miners' union not being a business enterprise cannot bind individual members by agreement with operators respecting performance of work and time and manner of payment. *Burnetta v. Marceline Co.*, 180 Mo. 241, 79 S. W. 136.

Members of employers' association sue union for not supplying union help according to a contract under seal between the two associations. Held: Doubtful if states cause of action and whether members can sue. If agreement under seal, the members certainly could not bring any action on it. *Barzilay v. Loewenthal*, 119 N. Y. S. 612, 134 App. Div. 502.

²⁰ Hence defendant was liable as surety on a bond for a Masonic lodge that he signed in consequence of false representations of a member. *Sewall v. Breathitt Lodge*, 150 Ky. 542, 545, 150 S. W. 677.

A declaration in libel against members of a merchants' association for blacklisting him as owing it \$3.38 held not demurrable. No discussion of principles of association. *White v. Parks*, 93 Ga. 633, 20 S. E. 78.

Defendant joined a so-called protective association which sent series of letters to debtors threatening to publish their names in a book to be distributed to members. Envelope said it was association for collection of bad debts. Defendant sent first letter in system and plaintiff and various local and central agents or officers then sent others of the series. Held: Libellous and not privileged. Real object of association was collection by threats, not protection. (No discussion of association's liability. Probably defendant would be liable on principle of agency.)

They have been held liable for negligence of an agent whom they placed in charge of their premises whether they knew of his specific act or not.²¹ Where an association knowingly took over property which had been cleared of liens by credit given by the plaintiff and others, the association was held to have taken it subject to such claims.²²

The nature of the obligation of an unincorporated benefit society to its members when no certificate defining the obligation or other written instrument is issued was considered at length by Chief Justice Shaw in an action to recover a funeral benefit of \$30 brought by the next of kin of a deceased member of an unincorporated lodge of Odd Fellows against certain of the members of the lodge. The lodge was but a component part of another aggregation of individuals called the "Grand Lodge" to whom, by the same voluntary agreement, the whole of the funds of the subordinate lodge might at any time be forfeited. In his opinion he said: Even if the lodge stood alone, "still the difficulty presents itself of a suit for thirty dollars, upon the joint promise of, say sixty persons, constituting a voluntary association of individuals, perpetually changing by the retirement of members and the admission of others. Shall the same sixty individuals, who constituted the

Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

²¹ Plaintiff sues for suffering and death of husband by attack of a bear escaped from grounds of club of which defendants were members where he was being kept as a prize. One defendant, president of the club, did not know he was there. Held: The club was not properly incorporated and so is a voluntary association. The members of the club employed agents in charge of the premises and were liable for his acts whether they knew about them or not. Dissent as to the defendant who did not know about it. *Vredenburg v. Behan*, 33 La. Ann. 627, 640, 645.

²² *Hosman v. Kinneally*, 90 N. Y. S. 357, 45 Misc. 411 (association sued under statute).

lodge when the implied promise took effect, be sued, though they have ceased to be members? If not, how can the residue be held upon a joint promise? Or shall those be sued who were not members when the implied promise took effect, but who have become such when the action is brought? If so, what joint promise of those who have since come in can be proved by the evidence?

“But without encountering these difficulties, we think there are two plain legal grounds upon which it may be held that this action cannot be maintained.

“1. The constitution and by-laws of the lodge, treating them as articles of a voluntary association, do not amount to a promise to each member by all the rest, to pay him anything. The stipulation in the by-laws is that, on the death of each member, there shall be allowed from the lodge a sum not less than thirty dollars, to defray the expense of burial, to be paid without delay to the deceased's nearest of kin. The payment is for that purpose. It is, if any promise at all, a promise by each member to contribute, by periodical and other payments, towards a certain fund, for all the purposes contemplated by the association, including money to be paid promptly for the expenses of burial, to be done usually before letters testamentary, in case of a will, or letters of administration, in case of intestacy, can be regularly issued. In other words, the promise of each member is to pay money to the lodge; and the lodge, not being incorporated, can maintain no suit. If it creates any right which can be recognized by law, it is an equitable right only to a share in a common fund, raised either for purposes purely charitable, or for their joint benefit, and can only be enforced in equity. And

if there were any ground for such equitable relief, as in case of partners in a joint fund, raised for a specific purpose, of which we give no intimation, such equitable relief could be sought only by a member or his legal representative.

“2. But supposing this stipulation in the constitution and by-laws of the lodge, to amount to an express promise to pay thirty dollars upon a certain contingency, there is no consideration for such promise moving from the plaintiff to the defendants, or from any person acting in privity with him or acting for his use or benefit, or with an intent and purpose to obtain a benefit to the plaintiff. There is no ground to infer, from the facts agreed, that the son, who was a member of the lodge, in paying his contributions thereto, had any purpose of obtaining money from the lodge, in case of his death, for the use of his father, or other next of kin, for his own benefit; to whomsoever it might be paid, under these provisions, it was a naked trust, for defraying the charges of his burial. It is, therefore, not at all analogous to the case, where A owes B and B owes C, and in consideration that B will release A, he promises to pay C. Such promise is valid, and C may sue A upon it. The reason is, that although the consideration for A's promise to C does not move from C, it moves from A for C's use and benefit.”²³

§ 65. Liability of Members of Associations of Employers and of Employees

In considering the liability of non-profit associations and their members for torts, one naturally thinks of the litigation that has grown out of modern combina-

²³ *Payne v. Snow*, 12 Cush. 443, 445.

tions of employers and employees. A thorough consideration of these cases, however, involves analysis of the law of monopoly, competition and unfair trade which is beyond the scope of this treatise. It is, moreover, not strictly a part of the law of associations, for although in almost every case an association either of employers or of employees was involved, the principles of law upon which the case turned would have been as applicable to an unorganized combination of individuals as to an organized association. For these reasons only an outline of the cases will be attempted.¹ These cases arise where economic pressure is brought to bear by a group for its own benefit against some other group or individual members of that other group. Obviously acts which when done by isolated individuals are harmless, become seriously damaging when done in concert by an association.²

Prima facie any damage intentionally caused by one man to another is tortious unless it is justified by the occasion.³ So in the warfare of competition by combinations, both as regards true competitors and as regards the other necessary element of business enterprise, capital or labor as the case may be, the issue is whether or not the courts recognize as a justification for the damage caused by the combination the immediate purpose of the acts complained of.⁴

¹ For a detailed analysis of the cases, see "Crucial Issues in Labor Litigation," by Jeremiah Smith, in 20 Harvard Law Review, 253, 345, 429, and "Competition and the Law," by Bruce Wyman, 17 Green Bag 210.

² *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753.

³ *Bowen, L. J.*, in *Skinner v. Shew*, (1893) 1 Ch. 413, 422; *Holmes, J.*, in *Aikens v. Wisconsin*, 195 U. S. 194, 204, 49 L. ed. 154, 25 S. Ct. 3.

⁴ *Mogul Co. v. McGregor*, 23 Q. B. D. 598, 613. It used to be said that an association became lawful or unlawful according to the means employed to attain its end. *Comm. v. Hunt*, 4 Met. 111.

It is of course true that illegal acts, such as violence in the midst of a

The justification usually recognized for the damage caused by pressure exerted by associations is a direct competitive financial or business interest of the defendant to be advanced by the act in question. Thus strikes for increased wages or better working conditions are legal.⁵ But a strike to advance the private interests of an individual is unlawful.⁶ So a strike to force the plaintiff to join the union by compelling the plaintiff's employer to discharge him is illegal.⁷ It has been held that though the purpose of a labor union to raise wages of its members is lawful, the purpose of a druggists' association to raise prices by controlling and restrain-

legal strike, will render those responsible for it liable in damages and will be enjoined. That, however, is a problem of the law of torts by individuals. The association is not a necessary element of it. The questions of the law of conspiracy come nearer to our subject. Thus it was held that an organization for the propagation of theories involving the present social system and division of property became an unlawful conspiracy if it advocated violent means or provided for drilling of troops in violation of the militia law. *Spies v. People*, 122 Ill. 1, 12 N. E. 865.

⁵ *Iron Molders Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A. — Wis.); *Mitchell v. Hitchman Co.*, 214 Fed. 685 (C. C. A. — W. Va.); *Lohse v. Fuelle*, 215 Mo. 421, 114 S. W. 997.

A combination of employers to meet a union demand for higher wages is legal, since not to lower but maintain prices. *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190.

The power of the union cannot properly be used simply to make the plaintiff pay a debt. *Giblan v. National, etc. Union*, (1903) 2 K. B. 600. See *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791.

A strike to prevent the use of helpers by employees engaged in piece work and thus diminishing the amount of work available for the strikers in dull seasons is justifiable. *Minasian v. Osborne*, 210 Mass. 250, 255, 96 N. E. 1031. It does not violate the Sherman Act. *Munroe v. Colored Ass'n*, 135 La. 893, 898, 66 So. 260.

⁶ A strike to force an employer to get rid of the plaintiff, a foreman, instituted because of personal hostility of one Dacey and a desire to advance his private interests was unlawful and plaintiff may recover damages from the officers and members of the union though the discharge was after a vote of all employees, union and non-union. The plaintiff may recover all his damages arising from the discharge and the inability to procure employment which may continue indefinitely. *Hanson v. Innes*, 211 Mass. 305, 97 N. E. 756.

⁷ *Fairbanks v. McDonald*, 219 Mass. 291, 106 N. E. 1000.

ing trade is unlawful.⁸ It is further generally held that the conflict of financial interest must exist directly between those who exert the pressure and those upon whom it is exerted, that is, that pressure through third parties not personally concerned in the conflict, such as the boycott, is illegal.⁹ Whether the strike to establish the closed shop is legal is more difficult of solution and the courts have differed on it.¹⁰ A strike by bricklayers

⁸ *Rourke v. Elk Drug Co.*, 77 N. Y. S. 373, 75 App. Div. 145.

⁹ *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753; *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841; *Branson v. I. W. W.*, 30 Nev. 270, 294, 95 Pac. 354.

Unions may refuse to work with non-union material. *Bossert v. United Brotherhood*, 137 N. Y. S. 321, 77 Misc. 592. But a strike against the use of goods of a single manufacturer though without personal hostility is illegal. *Bossert v. Dhuy*, 151 N. Y. S. 877 (App. Div.).

Bill against officers of a national trade union for an injunction against boycott of open shop goods of plaintiff. Held: There is no right of action for this at common law. The Sherman Act confines the remedy by injunction to the representatives of the government. The New York statute makes the offense a misdemeanor but prescribes no civil remedies. Hence an injunction may issue since there is a combination to do an act made unlawful by statute and by unlawful means. A persistent campaign to unionize the plaintiff's shop has been carried on and they have suffered in a different way from the community at large. *Irving v. Neal*, 209 Fed. 471, 479 (D. C. — N. Y.).

¹⁰ It was held illegal by the majority in *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (but with a striking dissent by Holmes, C. J.), and in *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327; *Lucke v. Clothing, etc. Assembly*, 77 Md. 396, 26 Atl. 505.

Labor union. Closed shop strike. Bill by non-union employees. Held: "What one individual may lawfully do, a combination of individuals have the same right to do provided they have no unlawful purpose in view" (p. 223). Courts are in conflict on subject, but Illinois holds closed shop purpose lawful (p. 225). Unions believe it essential to success of their organization. *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389. See *National Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369.

A provision in by-laws for limitation of apprentices is not an illegal purpose. *Snow v. Wheeler*, 113 Mass. 179, 185.

United Mine Workers of America held to be unlawful organization because of its purpose and practices, viz.: to monopolize labor market, because of a contract it had made with rival operators in another field to unionize West Virginia mines. *Hitchman Coal Co. v. Mitchell*, 202 Fed. 512 (D. C. — W. Va.).

to control the "pointing" work on the building they were working on was held legal.¹¹ As in the boycott, the pressure is exerted through a third party not directly concerned in the controversy between the two groups of workmen. Here the third party is directly concerned in dealing with both competitors, and in cases arising out of competition between employers similar pressure has been held justifiable.¹² When the pressure is exerted on third parties not directly concerned

¹¹ *Pickett v. Walsh*, 192 Mass. 572, 589, 78 N. E. 753.

¹² *Mogul Co. v. McGregor*, (1892) A. C. 25.

An association of retailers may agree not to patronize wholesalers who sell to mail order houses and circulate a list of such. *Montgomery Ward & Co. v. South Dak. Ass'n*, 150 Fed. 413 (C. C. — S. D.).

An association of fire underwriters for regulation of premiums, prevention of rebates, compensation of agents and non-intercourse with companies not members was held not an illegal conspiracy. *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 310.

An association of keepers of sailors' boarding houses designed to control the business of shipping seamen is a legitimate commercial device. *Bowen v. Matheson*, 96 Mass. 499.

An employer's blacklist was held legal. *Bradley v. Pierson*, 148 Pa. St. 502, 24 Atl. 65.

But a liverymen's association that prohibited members from doing business with those who do not patronize members exclusively was held an illegal monopoly. *Gatzow v. Buening*, 106 Wis. 1, 81 S. W. 1003.

A granite manufacturing association had a by-law imposing, in effect, a fine on members dealing with outsiders. Held: Though the object was not illegal, viz., competition, yet coercion by fines is illegal and the defendant is liable in damages. *Martell v. White*, 185 Mass. 255, 67 N. E. 1085. See *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607.

An agreement between employers and unions restricting competition but primarily for their own benefit and not aimed at the plaintiff is not illegal conspiracy. *National Fireproofing Co. v. Mason's Ass'n*, 169 Fed. 259 (C. C. A. — N. Y.). *Contra*, *Curran v. Galen*, 22 N. Y. S. 826, 2 Misc. 553.

One live stock exchange adopted rules forbidding members to trade with non-members. Members of a rival exchange sued members of first exchange, alleging conspiracy to boycott and monopolize. Held: Mere adoption of rules does not constitute a cause of action for plaintiff. No causal connection established. The rule applies only to the members and can only remotely affect outsiders. Implies that if members in fact refused to trade and carried out the rule it might be different. *Downes v. Bennett*, 63 Kan. 653, 661, 66 Pac. 623, 88 A. S. R. 256, 55 L. R. A. 560.

in dealing with both competitors the pressure exerted is generally held illegal.¹³

In most of these cases the litigation is between the individual damaged and members of the association as representatives of the whole and an injunction is sought against all members of the association.¹⁴ In some cases individual members of the association are sued to recover damages suffered from the acts complained of.¹⁵ It is often exceedingly difficult to pro-

¹³ *Loewe v. California, etc. Federation*, 139 Fed. 71; *Beck v. Railway Teamsters*, 118 Mich. 497, 77 N. W. 13; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881.

By-laws of an association to prevent wholesalers selling to outsiders provided for a claim by members against such wholesalers and required members to boycott. Held: A dealer could enjoin a member from making such claim. *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345.

But a wholesaler was held to have no action against the secretary for threatening to send a notice of boycott. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119.

Boycott illegal though the ultimate object was to benefit a union employed by the manufacturer boycotted. *Am. Fed. of Labor v. Buck's Stove Co.*, 33 App. D. C. 83.

Bricklayers may not strike because employer employs on another job non-union pointers. *Pickett v. Walsh*, 192 Mass. 572, 587, 78 N. E. 753.

¹⁴ *L. D. Willcut & Son Co. v. Bricklayers' Union*, 200 Mass. 110, 85 N. E. 897; *Thomas Russell & Sons v. Stampers', etc. Union*, 107 N. Y. S. 303. Injunction will not be granted on evidence merely of misconduct of individuals. Authorization must be proved. *J. T. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027; *Aluminum Co. v. Local No. 84*, 197 Fed. 221.

¹⁵ A demurrer to a complaint under the Sherman Act against members of a union for conspiracy to boycott was overruled (*Danbury Hatters' case*). *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 S. Ct. 301; *Lawlor v. Loewe*, 235 U. S. 522, 535; *Hanson v. Innes*, 211 Mass. 301, 305, 97 N. E. 756.

Tort for conspiracy. Defendants were granite manufacturers and members of a local association of employers affiliated with a New England association. This association passed resolution that members should trade only with members. By-laws imposed fine for violation of any rules. They had tried to get plaintiff to join and admitted they passed vote to make plaintiff join. Plaintiff's business destroyed. Held: Defendants liable. The penalty made the rule intimidation of minority by majority. Illegal means made it actionable conspiracy. "When the will of the majority of an organized body in matters involv-

duce evidence of authorization or ratification by the defendants of the acts complained of.¹⁶

ing the rights of outside parties is enforced upon its members by means of fines and penalties the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation" (p. 8). "The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body, cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men could deprive their fellows of established rights simply by working through an association" (p. 9). "It is clear that the law cannot concede to organizations of this character the powers and immunities claimed for their association by these defendants and retain its own power to protect the individual citizen in the free enjoyment of his capital or labor" (p. 10). *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803.

Tort for conspiracy brought against members of labor union for depriving plaintiff of hearse at funeral. Held: Illegal combination in restraint of trade. Does not matter what expressed purposes of organization are if this act of theirs was unlawful. If the combination is unlawful, it is none the less so because it is in the form of an association. *Gatzow v. Buening*, 106 Wis. 1, 14, 81 N. W. 1003, 80 Am. St. Rep. 17, 49 L. R. A. 475.

Action of conspiracy against labor union for strike to enforce closed shop held maintainable and damages collectible from members "so implicated as to be responsible for what they helped to set in motion or helped on." *Roofing Co. v. Jose*, 12 Ont. L. R. 200.

¹⁶ Should have submitted to jury whether evidence proved individual defendants authorized acts of agents of union. Mere payment of dues even after suit started was incompetent evidence. Fact that union had clause in constitution that officers shall use all means in power to unionize shops is not enough to prove assent of members to illegal means unless it appears that with the knowledge of the members unlawful means had been so frequently used with the express or tacit approval of the association that its agents were warranted in assuming that they might use such means in the future and that members would tolerate it. *Lawlor v. Loewe*, 187 Fed. 522, 526 (C. C. A. — Conn.). See *Hill v. Eagle Co.*, 219 Fed. 717 (C. C. A. — W. Va.).

In the final appeal of the *Danbury Hatters'* case for damages under the Sherman Act for boycott, the court said: "The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiff's interstate commerce in such circumstances that they knew or ought to have known and such officers were warranted in the belief that they were acting in the matter within their delegated authority, then such members were jointly liable and no others. It seems to us that

An action was brought by contractors against a trade union which controlled the local labor market in its trade. The union had notified him of its wage scale and he paid it to his employees. The union lowered its scale without notice to him and he continued to pay the old scale. He sought to recover the difference in wages from the union, joining some members to represent all. A demurrer was overruled. The court said that though he had no contract with the union, the relation established by its monopoly was the same as contract. Further he was entitled to rely on its representations. The failure to notify of the change made the old notice a continuing misrepresentation.¹⁷

this instruction sufficiently guarded the defendants' rights and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask any one to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the 'We don't patronize' or 'Unfair' list were means expected to be employed in the effort to unionize shops." *Lawlor v. Loewe*, 235 U. S. 522, 535.

If an agreement not to work on non-union trim enforceable by fine is unlawful, defendants are liable for anything done to carry it out even if they did not participate, for the agreement is part of the organic law of the association. *Irving v. Neal*, 209 Fed. 471, 476 (D. C. — N. Y.).

Prosecution of founder of a so-called labor union alleged to be a treasonable conspiracy. Held: Evidence of acts of defendant while he was president did not prove that he acted under instructions from the association or that the association was formed for the purpose of committing those acts. The fact that the founder of an association may have had an illegal purpose in view does not make association illegal under the penal code. *U. S. v. Gomez*, 8 Philippine 630, 651.

Cannot enjoin for acts of delegates as individuals where union and members took no part in the strike. *Pickett v. Walsh*, 192 Mass. 572, 589, 78 N. E. 753.

Ratification of violence by a trade union may be proved by circumstantial evidence but an allegation of conspiracy requires direct proof. *Thomas Russell & Son v. Stampers' Union*, 107 N. Y. S. 303.

Where labor lodges maintained strikes of members by money contributions to support strikers and picketers and the use of abusive epithets was open and notorious during the strike they are liable as having aided and abetted such misconduct. *Jones v. Maher*, 116 N. Y. S. 180, aff'd 125 N. Y. S. 1126, 141 App. Div. 919.

¹⁷ *Powers v. Journeymen*, 172 S. W. 284 (Tenn.).

Plaintiff had a contract for musicians with a union. He did not like the ones they furnished and desired to employ other members of the union who were willing to work but feared fines and expulsion if they did so. The court refused an injunction. He voluntarily made a contract and must abide by the union rules.¹⁸

§ 66. Rights of Creditors to Reach the Funds of the Association

It is a different question whether the funds of the association are liable for the contracts and torts of the association, and if so, how they can be reached. It is generally held that for contracts of the association its funds can be reached in a representative proceeding in equity,¹ and only in such proceedings.² When the contract was made by trustees of the funds of the associa-

¹⁸ *Rhodes Bros. Co. v. Musicians' Union*, 92 St. 641 (R. I.).

¹ *Van Houten v. Pine*, 36 N. J. Eq. 133, 137 (benefit society).

Pastor of a Catholic church borrowed money of plaintiff and others upon written contracts of repayment in the form of deposit books in the name of the church. The money was mingled with the general church revenues and used to pay its expenses and debts and to acquire property. In an action against the bishop on these contracts the court said: "It cannot be assumed that the plaintiff could not have given credit to the fund. The fund would have been the ultimate resort for payment had the church been incorporated under the statute or had the deposits been in an incorporated savings bank, and it is not necessary that there should have been any personal liability on the contract in order that there should be a remedy against the fund." *Leahy v. Williams*, 141 Mass. 345, 357, 6 N. E. 78.

Held: That a social club though without constitution or by-laws and without purpose of pecuniary profit or advantage ought to be liable under the New York statute as a joint stock association. In an action against the president as such for a purchase made by him while acting as a committee of the club, the question should have been submitted to the jury whether credit was given to the club or not. (*Disapproving Park v. Spaulding*, 10 Hun 128). *Ebbinghausen v. Worth Club*, 4 Abb. N. C. (N. Y.) 300.

² *Moore v. Stemmons*, 119 Mo. App. 162, 166, 95 S. W. 313 (trustees of church); *Fletcher v. Tribe*, 9 Pa. Sup. Ct. 393, 397 (benefit society); see *Maisch v. O. A.*, 223 Pa. St. 199, 200, 72 Atl. 528.

tion in their capacity as trustees, upon well-established principles of the law of trusts, the plaintiff can reach and apply in payment of his debt the trust fund by proper proceedings in equity.³ In one case it was held that the fund could be reached without the aid of a bill in equity.⁴ Apparently the same result has been attained

³ Bill in equity on promissory note signed by two of three trustees of the society of Shakers. Held: "The society was not a partnership. Neither was it a corporation, in the proper sense of that term. The members have no property, having renounced all to the society. It is a somewhat anomalous case, but is yet of a kind that occasionally appears in the books of reports and in regard to which the law has been settled by a number of decisions." Suit against individual members would be good only against those *sui juris* and not dead. Members have no private property for satisfaction of a judgment (p. 737). "The note was not effectual against anything but this changing body, and that only by supposing it to be intended to be a charge against the property which all the members of the society had concurred in putting in a common name in the hands of the trustees of the society" (p. 738). Hence created equitable lien, so it is not a mere legal liability on which the action is brought. Though signed by individuals described as trustees of the society, evidence is admissible to show it is the obligation of the principal and not the agent (p. 740). *Shaker Soc. v. Watson*, 68 Fed. 730, 37 U. S. App. 141, 15 C. C. A. 632.

A debt of a church may be satisfied out of property held in trust for it by trustees who are made defendants. The debt here was evidenced by a note of the trustees authorized by a resolution of the church. It appears to have been a bill in equity. *Lyons v. Planters*, 86 Ga. 485, 490, 12 S. E. 882. (Query if incorporated.)

A bill in equity may be brought by a creditor of a church against its trustees to subject its property to payment of his debt. *Linn v. Carson*, 32 Gratt. 170, 183 (Va.).

Trustees of an unincorporated Methodist church had authority to mortgage the church property to reimburse themselves for advances. The trustees gave their personal notes to the plaintiff for money loaned. He brought a bill in equity to subject the church property to payment of his debt. Held: When a trustee has power to sell or mortgage, equity will enforce a sale or mortgage to secure a debt contracted within his authority (p. 668). The notes here were recognized for a time as binding by being printed in the list of the debt of the church. The fact that the trustees did not add the designation of their office did not affect their rights as against the church (p. 669). The trustees are the only necessary parties defendant. It is practically impossible to bring in all the beneficiaries (p. 670). It is immaterial that plaintiff is one of the trustees. *Bushong v. Taylor*, 82 Mo. 660.

⁴ In an action of contract against the trustees of a "Family of Shakers," a judgment against them and their successors in office would be valid, and would be satisfied out of the funds of the

by statute.⁵ Mechanics' liens on the property of the association have been enforced under contracts made by a trustee.⁶ It is not yet clear if the property of the association is liable for the torts of its members,⁷ but on the usual principles of agency it should be liable for torts of its officers in the course of acts within the scope

society without the aid of a bill in equity. *Davis v. Bradford*, 58 N. H. 476, 480.

⁵ Under Georgia code a proceeding may be brought to subject to a debt of an unincorporated church property held for it by trustees. The trustees are the only necessary parties. A pastor may so sue for payment of his salary and for the value of rent of a parsonage he claimed the right to occupy as part of the contract for his services. *Kelsey v. Jackson*, 123 Ga. 113, 114, 50 S. E. 951. Acc. on first point. *Josey v. Union Loan & Trust Co.*, 106 Ga. 608, 32 S. E. 628.

Where an unincorporated church used for two years a piano bought for it by the pastor, it shows ratification of the purchase and an action may be brought to subject the property held by its trustees for the debt. *Smith v. Goode, etc. Co.*, 68 S. E. 620 (Ga.); *Bastrop v. Austin Rice Growers' Ass'n v. Cochran*, 171 S. W. 294 (Tex.) (must first exhaust assets of association).

⁶ Members joining a church authorize its trustee to act to the extent of his beneficial interest in the property of the association and any debt contracted by the trustees on account of the premises will be the debt of the members to the extent of the interest held by the trustees, and a mechanic's lien on the property can be enforced. *Harrisburg Co. v. Washburn*, 29 Ore. 150, 162, 44 Pac. 390.

A lien cannot be enforced against the property of a church in an action against individuals alleged to be trustees without evidence of their authority to bind the church. *Owens v. Caraway*, 110 S. W. 474 (Tex.).

Notice of a lien given to a Catholic bishop who holds as trustee for an unincorporated congregation is not a notice to the real owner because under the statute of Pennsylvania he holds only as passive trustee. *Carrick v. Conevin*, 243 Pa. 283, 90 Atl. 147.

A majority of a church congregation including its trustees voted to make repairs on the church, expecting to raise the money by voluntary contributions. The plaintiff did the work under contract with a committee appointed by the church for that purpose. Held: He may enforce a mechanic's lien against the church building, naming the trustees as defendants. *Cortemiller v. Rosengarn*, 103 Ind. 414, 418, 2 N. E. 829.

⁷ *Elkington v. London Ass'n*, (1911) 28 T. L. R. 117 (tort for libel but words held not libellous); *Brown v. Lewis*, 12 T. L. R. 455 (tort against committee of football club for negligence in erecting a stand); *Connell v. United Hatters*, 74 Atl. 188 (N. J.) (tort against labor union for consequences of a strike); *Ruddy v. United Ass'n*, 76 N. J. L. 467, 75 Atl. 742 (tort against labor union for malicious interference with contract).

of their authority. Attempts to exempt by legislation trade unions and associations of employers from liability for torts of their members committed on behalf of the association will doubtless be held unconstitutional as class legislation.⁸

English trade unions occupy a somewhat different position from those in the United States. At common law in England they were held illegal as combinations in restraint of trade. By statute unions that register under the statute have been legalized for some purposes and have received certain rights similar to those conferred on corporations. In the Taff Vale case it was held that having received by statute corporate privileges a union became subject also to like responsibilities and could be enjoined in its association name for the torts of its agents and the funds of the union were held liable for the damage caused.⁹ Before the Trade Disputes Act of 1906 the funds of an English trade union could be reached by a plaintiff damaged by a libel published by the union.¹⁰ If the funds were vested in trustees they might be joined as defendants.¹¹ Now this can be done only if the act was not in contemplation or furtherance of a trade dispute.¹²

§ 67. Powers of Officers

Officers of non-profit associations have not the implied authority which officers of business associations would have.¹ They clearly have no power to transfer

⁸ Opinion of the Justices, 211 Mass. 618, 98 N. E. 337.

⁹ Taff Vale Ry. Co. v. Amalgamated Soc., (1901) A. C. 426.

¹⁰ Linaker v. Pilcher, 70 L. J. K. B. 396.

¹¹ South Wales Federation v. Glamorgan Co., (1905) A. C. 239.

¹² Richards v. Bartram, 25 Times L. R. 181.

¹ A treasurer of an unincorporated association (Japanese Farmers' Association) has no implied power to endorse for suit notes given to the

all the property of the association to another organization.² Where they advance money to buy for the association property which they were authorized to buy they have a lien upon it for their reimbursement.³ They are subject to the usual fiduciary obligations.⁴ But a treasurer, sued for funds which he got together to distribute under a void vote, cannot set off expenses incurred in preparing to carry out the vote or in de-association as penalty for breach of contract. *Nakegawa v. Okamoto*, 164 Cal. 718, 723, 130 Pac. 707.

The fact that one R was trustee for a lodge was not of itself sufficient from which to infer that he had authority to make a contract for the sale of property belonging to the lodge. (This was action for commissions.) *Castner v. Rinne*, 31 Col. 256, 72 Pac. 1052.

An assignment properly drawn and executed by the president of a corporation and having its seal is presumptively authorized, but not if it is an unincorporated association. Not a partnership and must prove authority of agent from individual members. *Brower v. Crimmins*, 121 N. Y. S. 648, 67 Misc. 68.

Although the deacons of an unincorporated church were by statute given limited corporate powers to take property in succession, they have no power to issue notes binding their successors or the church or to make executory contracts. *Jefts v. York*, 10 Cush. 392, 394.

² *Rudolph v. Southern Beneficial League*, 7 N. Y. S. 135, 739, 23 Abb. N. Cas. (N. Y.) 199 (incorporation of benefit society by executive board).

Property of an unincorporated association is not transferred to a corporation organized by its officers to succeed it without a vote of the association. *Koprucki v. Wojenechowski*, 130 N. Y. S. 736, 73 Misc. 46.

Trustees for a church held under a deed forbidding them to sell without "the concurrence of two-thirds of the membership of the church for the time being." A mortgage of the church was given to one who paid off its debts and nine years later was foreclosed. The authority to mortgage was disputed by heirs of a surviving trustee. The congregation had dispersed. There was no evidence that the mortgage was authorized at a church meeting, but all witnesses admitted they knew of it at the time. Held: It was ratified by their acquiescence. The law presumes that every one performs his duties. After a long lapse of time such presumptions may be indulged to supply deficiencies in a title. *McCallister v. Ross*, 155 Mo. 87, 94, 55 S. W. 1027. *Acc. Rountree v. Blount*, 129 N. C. 25, 39 S. E. 505.

³ *Minnett v. Lord Talbot*, 1 L. R. Ire. 143.

⁴ A lodge may recover money of lodge used by officer to pay personal debt when defendant was charged with notice by signature of check as "Grand Treas." *Washbon v. Hixon*, 87 Kan. 310, 124 Pac. 366.

fending a suit to enjoin distribution.⁵ The usual rules regarding tenure of office⁶ and duties⁷ apply. A Society of Shakers was held estopped to deny the authority of two out of three trustees to bind it in contract because that had long been its custom.⁸

§ 68. Liability of Officers and Agents

Liability in these cases depends on principles of agency. Hence the rule that when the principal for whom an agent purports to act is not liable, the agent may be held personally, has been applied to acts by officers and committees of these associations without express authorization by the members.¹ In some cases liability is put on the ground that the association, the supposed principal, could not be liable as such, though the members individually might.² In most cases, how-

⁵ *St. Mary's Benev. Ass'n v. Lynch*, 64 N. H. 213, 9 Atl. 98.

⁶ By-law providing for election of physician to hold office "during pleasure of association" authorizes dismissal at any regular meeting in absence of by-law to contrary. *Brandon v. Worley*, 28 N. Y. S. 557, 8 Misc. (N. Y.) 253, 59 N. Y. St. 237.

⁷ Sureties on a bond given by a treasurer of a lodge, an unincorporated association, are not discharged by changes in membership after execution or an increase involving greater responsibility. All this must have been contemplated when the bond was given. *Coombs v. Harford*, 99 Me. 426, 429, 59 Atl. 529.

⁸ *Shaker Soc. v. Watson*, 68 Fed. 730, 741 (C. C. A.).

¹ *Caldicott v. Griffiths*, 8 Exch. 898, 903, 23 L. J. Exch. 54 (trade association to get information about legislation); *Osborne v. Dickey*, 71 S. E. 763 (Ga.) (committee contracting for banquet); *Lewis v. Tilton*, 64 Ia. 220, 19 N. W. 911 (landlord suing a club); *Comfort v. Graham*, 87 Ia. 295, 298, 54 N. W. 242 (ditto); *Riffe v. Proctor*, 99 Mo. App. 601, 608, 74 S. W. 409 (church); *Bartholomae v. Kauffman*, 47 N. Y. Super. Ct. 552, aff'd 91 N. Y. 654 (agent purporting to sign for trustees of an association when there were no trustees); *McCartee v. Chambers*, 6 Wend. 649 (committee appointed by a public meeting); *Linceln v. Crandall*, 21 Wend. 101 (committee preceding a corporation); *Fredenhall v. Taylor*, 23 Wis. 538, 540, aff'd 26 Wis. 286, 291 (committee of an association).

² National society not liable for services of a State organizer em-

ever, liability could be established on the ground that the contracting party was a member as well as an agent of the association.³ If he contracts as an individual, he is personally liable unless he expressly limits his liability.⁴ In a few cases the court appears to have held the member contracting not personally liable because he acted as agent.⁵ It is probable that these cases could

ployed by unincorporated State society. *Crawley v. Am. Soc. of Equity*, 153 Wis. 13, 18, 139 N. W. 734.

³ *Cullen v. Queensbury*, 1 Bro. Ch. 101 (committee of club); *Robinson v. Robinson*, 10 Me. 240, 243 (agent of meeting that subscribed to building for an academy); *Chick v. Trevatt*, 20 Me. 462, 464 (trustees of society for building a parsonage. Notes of trustees); *McGreary v. Chandler*, 58 Me. 537 (note of directors); *Band v. Infantry*, 134 Mich. 598, 601, 96 N. W. 934; *Evans v. Lilly*, 95 Miss. 58, 61, 48 So. 612; *McWilliams v. Willis*, 1 Wash. 199, 202 (Va.) (lease of race track); *McKinnie v. Postles*, 4 Penn. (Del.) 16, 54 Atl. 798 (committee securing quarters at a convention).

Members of a building committee of an unincorporated Catholic church were held personally liable for materials furnished although the plaintiff charged them on his books to the church and knew that it was intended to raise the money by voluntary contributions. These two facts are not enough to imply a contract to be paid only out of the fund to be raised. The committee are liable either as members of the association authorizing the work or as agents of a principal who is non-existent. The fact that others equally liable have not been joined is no defense on appeal. It should have been pleaded in abatement. *Clark v. O'Rourke*, 111 Mich. 108, 113, 69 N. W. 147.

Those contracting in the name of an unincorporated association are themselves liable either as themselves principals or as purporting to act for a non-existent principal. *Blakeley v. Bennecke*, 59 Mo. 193.

⁴ A member of a building committee of a church may be personally liable for goods forwarded on his order if he did not expressly limit his liability. *Cruse v. Jones*, 71 Tenn. 66.

The trustees of an unincorporated church signed a note as individuals for its debt. Held: They are personally liable on the note. To escape liability on the ground that they were merely agents they must show a principal who is legally liable. *Phoenix Ins. Co. v. Burkett*, 72 Mo. App. 1, 3.

⁵ A majority of the building committee of a church signed a contract for the work in their individual names, adding "a committee for building," etc. Held: They were not personally liable on the contract. The intent to contract as agents was plain and though acting only by a majority, it was ratified later by the votes of the society. *Hewitt v. Wheeler*, 22 Conn. 557, 563.

Plaintiff made a written offer to build a church for a price named. It was accepted by the defendants individually. He sued them for the price. Evidence showed they had acted only as a committee of the

be distinguished on a more careful statement of facts.

Cases have arisen where the plaintiff sought to impose liability because the defendant was a member of a committee of an association which committee had contracted with the plaintiff. The same principles apply to these small groups. A member of the committee is not liable in the absence of evidence of authorization or ratification.⁶ Ratification may be found from evidence of knowledge.⁷ Ratification cannot

church. Held: Not individually liable. *Johnson v. Welch*, 42 W. Va. 18, 24 S. E. 585.

The head of an unincorporated Catholic sisterhood was sued by a priest for return of a contribution he made to its building fund on condition that if they ceased to use it for the purpose of a convent then it was to be returned to him. Held: She was not individually liable because she acted as agent only in receiving it. *Emonds v. Termehr*, 60 Ia. 92, 94, 14 N. W. 197.

A member of the building committee of an association formed to build a church who contracts as such with a fellow member for such services, is not personally liable, for the plaintiff knows that he acted only as agent for that society. *Abbott v. Cobb*, 17 Vt. 593.

⁶ *Kutemen v. Lacy*, 144 S. W. 184 (Tex. App.) (building committee of a lodge); *Todd v. Emly*, 10 L. J. Exch. 161, 262, 7 M. & W. 427, 8 M. & W. 505, 509 (managing committee of a club. Action for wine sold the house steward); *Cross v. Williams*, 7 H. & N. 675, 681, 31 L. J. Exch. 145, 6 L. T. Rep. N. S. 675 (committee in charge of military corps).

Members of a building committee of a church were held not personally liable on their contracts as such. "They were appointed by the body of the subscribers to execute a mere trust." *Cheney v. Clark*, 3 Vt. 431, 435.

⁷ The officers of a dispensary were also the managing committee. Held: Liable for drugs supplied through dispensary on orders of other officers on behalf of the committee to their knowledge. This was the regular course of dealing. *Prima facie* this makes them liable unless the plaintiffs agreed to look only to the fund for payment. *Luckombe v. Ashton*, 2 Fost. & Fin. 705.

A club in debt authorized its committee of management to borrow money. Defendant and plaintiff were members of committee. Defendant evidently knew it was being done though he did not attend all the meetings at which it was discussed, including the meeting at which the specific loan was arranged. Plaintiff had to pay the loan and now sues for contributions. Held: Liable. Defendant knew and approved what was being done. *Mountashel v. Barber*, 14 C. B. 53, 68.

Subscribers to establish a hospital elected a committee to manage it.

be found of a contract that did not purport to bind the defendant.⁸

§ 69. Dissolution

A vote of a majority of an association to dissolve and distribute the assets of the association among its members is void unless adopted in accordance with the provisions of the by-laws or rules of the association.¹ The

Defendant was a member of the committee and frequently attended meetings and was at a meeting when steward presented a balance sheet showing plaintiff's claim. Held: Defendant personally liable. *Burle v. Smith*, 7 Bing. 705.

A "provisional committee" preparing to form a corporation is liable for debts incurred by its secretary only if authorized on the principles of principal and agent. Mere membership is not conclusive, but is competent evidence of authorization. If he knew of the weekly meetings of the committee and saw its secretary doing work which involved buying stationery, that was evidence of authorization of its purchase, though he never specifically authorized pledging his individual credit or thought of liability at all. *Bailey v. Macauley*, 19 L. J. (Q. B.) 73, 81.

A member of a provisional committee to organize a railroad was held personally liable for a bill for stationery. He knew it was being used and that the committee had no funds. *Barnett v. Lambert*, 15 M. & W. 489, 492.

Charge to jury that managers of club were liable for meats ordered by servants of the club even if they had no personal knowledge. *Steele v. Gourley*, 3 T. L. R. 118.

But merely joining other members of a committee in appointing a sub-committee according to the rules of a club did not constitute an authorization of expenditures so as to make defendant personally liable, though the rules said that all authority of the general committee was vested in the sub-committee. *Draper v. Manvers*, 9 T. L. R. 73.

⁸ Action cannot be brought against seven trustees of a church on a contract signed by three of them as individuals even on an allegation that they were appointed a committee of the trustees to sign the contract without reformation of it. They cannot ratify what does not purport to bind them. *Ashley v. Henderson*, 166 Ind. 147, 76 N. E. 985.

¹ *St. Mary's Benev. Ass'n v. Lynch*, 64 N. H. 213, 9 Atl. 98 (benefit society. No notice of meeting. By-laws forbade dissolution if ten objected); *Kuhl v. Meyer*, 42 Mo. App. 474 (benefit society. But though the vote at the meeting improperly called did not dissolve it, the jury might find it dissolved *de facto* by failure to collect dues in accordance with another provision of the by-laws for lapse of membership by non-payment of dues); *Torrey v. Baker*, 1 Allen 120, 122 (fire

assent of every member is required to effect a merger of an association in a corporation.² A petition for dissolution of an association on the ground that dissensions made it impracticable was denied.³ Arbitrary dismissal of a member was not sufficient ground for a petition by him for distribution of its funds.⁴ But where the association had insurance features, the rules applicable to petitions for dissolution of partnerships were applied.⁵

company. Rules required two-thirds vote); *Fischer v. Raab*, 57 How. Pr. 87, 94 (N. Y.) (benefit society. Constitution provided that there should not be dissolution if five voted to continue).

With the consent of all members a mutual burial society could dissolve and distribute assets among members. *Stemmerman v. Lilienthal*, 54 S. C. 440, 448, 32 S. E. 535.

In the case of a farmers' telephone line it was held that the members could divide some of its property in severalty and sell the remainder at auction and then reorganize and cut off one of their former members. *Primm v. White*, 162 Mo. App. 594, 142 S. W. 802.

² *Mason v. Finch*, 28 Mich. 282.

³ *Lafond v. Deems*, 81 N. Y. 507, 514 (see 52 How. Pr. 41, 48) (benevolent society); *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98, 111 (Pa.) (fire company).

⁴ *Burke v. Roper*, 79 Ala. 138, 144. See *Burke v. Roper*, 83 Ala. 193, 3 So. 439 (religious society).

⁵ Plaintiffs, members of labor union, filed bill for dissolution on ground that they had been excluded from meetings unless they would take an oath not provided for in the constitution or by-laws. The association provided for sick benefits. On demurrer, Held: The association is a partnership and not a charity. "It partakes of the nature of a partnership" (p. 535). Exclusion of partners from participation in business is ground for dissolution. Demurrer overruled (p. 538). *Gorman v. Russell*, 14 Cal. 531. Having reinstated the members and abolished the oath it was right that the decree of dissolution be refused. *Gorman v. Russell*, 18 Cal. 688; *Fischer v. Raab*, 57 How. Pr. 87, 94 (N. Y.).

Members of a benevolent society filed a bill to restrain the trustees of the society from dissolving it and distributing its assets. It was stipulated in the articles that it should never be dissolved so long as seven members would support it. Nature of society not clear but seems to have been some sort of mutual insurance scheme. Held: Nature of the organization such that its agreement cannot be specifically enforced. The only relief is to order a dissolution and distribution of assets. Court describes it as a partnership. *Beaumont v. Meredith*, 3 Ves. & Beames 180.

An injunction was granted on a bill to restrain the trustees of a Friendly Society from applying any of its funds to the payment of the

“Equity takes cognizance of the affairs of such associations and grants relief by treating them as partnerships or by looking into the scheme and compelling conformity to it or reforming it and enforcing it; or if the plan is deemed impracticable, decreeing a dissolution and distributing the funds; and speaking generally, it redresses as far as it can the grievances of the members of these societies who complain to it of injustice affecting their pecuniary interests therein.”⁶

Inactivity continued for a sufficient length of time may be held to have been a dissolution.⁷

annuities payable according to its rules, and for dissolution on the ground that its rules were framed on erroneous principles and the annuities had become so numerous as to be likely to exhaust the whole fund. *Reeve v. Parkins*, 2 Jacob & Walker 390.

A local lodge of a fraternal order unincorporated voted to dissolve connection with the Supreme Circle, when a few of its members, assuming to act for it, proceeded to incorporate under the laws of New York. Held: The unauthorized incorporation of the parent circle materially changed the preëxisting legal relations between that body and its subordinate circles. “From an association whose obligation to and control over its members was entirely voluntarily the Supreme Circle by its formal incorporation in New York State became thereafter clothed with compulsory powers over its members.” The purpose for which the subordinate circle had been formed has failed, and like a partnership it was *ipso facto* dissolved and its property should be distributed *pro rata* to the members by receivers. *Pierson v. Gardner*, 81 N. J. Eq. 505, 509, 86 Atl. 442.

⁶ *Van Houten v. Pine*, 36 N. J. Eq. 133, 137. See *Burke v. Roper*, 79 Ala. 138, 144.

Partial distribution may be ordered as a means of reorganization. *Piries v. First Russian Soc.*, 83 N. J. Eq. 29, 89 Atl. 1036.

⁷ From 1836 to 1859 no meetings of a Masonic lodge were held. Pursuant to vote it had sold all property and placed funds in hands of academy trustees to use as own and return principal on demand. No officers elected or action taken. Later there was a revival of Masonry and a new lodge was formed which claims the funds, relying on rule that officers hold office till successors are elected and on the intent of individual members to resume some day. Held: Such associations may become dissolved by non-action for a sufficient length of time and this period seems sufficient. The rule about officers' terms was not meant to apply to a case like this. Intent of individuals immaterial. Legal existence of old chapter gone and could not be restored by Grand Chapter. *Strickland v. Prichard*, 37 Vt. 324, 327.

Neither loss of corporate property, nor failure to hold regular meet-

Death⁸ or withdrawal⁹ of a member of course does not produce a dissolution.

Upon dissolution of an association, its net assets should be divided equally among those who are members at that time.¹⁰ If, however, the funds have been impressed with a trust, it will be enforced and the members are not entitled to divide the funds among themselves.¹¹

ings or to elect corporate officers, nor all combined necessarily amount to a forfeiture unless continued for a long term of years. But when it is conceded that the objects of the corporation have been entirely abandoned or when it appears that the power to resume business does not exist, then a legal dissolution may be declared. This rule of corporations applies to unincorporated associations. *Kuehl v. Meyer*, 50 Mo. App. 648, 656. See *Kuehl v. Meyer*, 42 Mo. App. 474.

Members and officers of a labor union joined another similar one which had a clause in its constitution forbidding members to belong to any other such organization. The first union did not have such provision in its constitution. Held: That the first union was not dissolved by the act of its officers and that though the rule of the second union might justify expulsion from that, it did not affect membership in fact. *Farrell v. Dalzell*, 5 N. Y. S. 729.

A testatrix left property in remainder to a church. When the life estate ended it appeared that the church had had no pastor or meetings for fifteen years. Eleven persons who had been members then met and elected trustees but did nothing more. Held: An association may be dissolved by abandonment as well as by voluntary action. The action of these individuals could not recreate it. *Miller v. Riddle*, 227 Ill. 53, 58, 81 N. E. 48.

A member of an association cannot compel in equity a return of his contribution to its funds unless he establishes that the purposes of the association have been abandoned, its operations ceased and its objects entirely failed. Perversion of funds by trustees will be prevented and the trustees held accountable, but perversion alone does not authorize distribution to the members. *Roper v. Burke*, 83 Ala. 193, 195, 3 So. 439. See ditto, 79 Ala. 138.

⁸ *Ostrom v. Greene*, 161 N. Y. 353, 360, 55 N. E. 919 (dictum).

⁹ *Moore v. Telephone Co.*, 171 Mich. 388, 399, 137 N. W. 241 (sale of all interest in a farmers' telephone line).

¹⁰ *Parks v. Trust Co.*, 122 N. Y. S. 521, 137 App. Div. 719 (association of corporations); *U. O. A. D. v. Mullen*, 24 O. C. C. 239 (lodge); *Brown v. Dale*, 9 Ch. D. 78 (guild); *Re Printers', etc. Soc.*, (1899) 2 Ch. 184 (divided *pro rata* their contributions).

¹¹ *Smith v. Kerr*, (1902) 1 Ch. 774.

The Connecticut Lodge of United Workmen were set off from jurisdiction of the Massachusetts Grand Lodge under a Connecticut Grand Lodge. Latter brings bill in equity for them for proper division of funds. Held: The various lodges and grand lodges are not independent,

When a fund is held in trust for contributors, it will be distributed to them in proportion of their contribu-

but are under a common law which comes from the members. "The complaint alleges that the order is a fraternal insurance organization. The rights of its members are, accordingly, something more than that of social association. Rights of property are attached to membership." Equity will enforce the trust attached to these funds. *A. O. U. W. v. A. O. U. W.*, 81 Conn. 189, 205, 70 Atl. 617.

Members of a church of a denomination whose rules provide that on dissolution property vests in a board of the general denomination, cannot claim that on abandonment property should be sold and proceeds divided among members. *Heisler v. Methodist Church*, 147 N. W. 750 (Ia.).

By-laws of a Masonic lodge appropriated its property to promoting "the good of the craft or relief of indigent and distressed worthy Masons, their widows and orphans." Held: This is trust for charity, however derived. Such a body may dissolve but trust fund cannot be distributed to members. Trust will be executed. Hence this suit by a member for his share fails. *Duke v. Fuller*, 9 N. H. 536, 540, 32 Am. Dec. 392.

A local lodge of K. of P. dissolved and divided its assets among the members, including trust funds that had accumulated. Law of order provided that on dissolution all assets vest in Grand Lodge, a corporation which here sues the individuals who divided up the funds. Held: Those who took an active part in the division are jointly and severally liable for the whole fund. Trust funds cannot be diverted from the trust set forth in the constitutions of supreme and subordinate lodges and those assisting in breach of trust are liable for the consequences. *Grand Lodge, K. P. v. Germania Lodge No. 50*, 56 N. J. Eq. 63, 73, 38 Atl. 341.

Bill by members of charitable association against its treasurer for an account. The association voted in 1825 to transfer its funds to another society having the same object. Then held no meetings till 1830, when meeting voted to transfer some of its funds to a seminary not having the same object. Apparently first vote was not carried out. Held: Associations for charity are trustees of funds contributed. Officers will as trustees be bound to account. Contributions must be deemed made according to the articles of agreement whether called constitution or by-laws. If so provided, majority may control minority within the purposes of the association. Fund cannot be diverted to different object without the consent of the contributors, and if the object entirely fails then contributors would be entitled to a refund. The first vote was to a society having the same objects and so was valid. The second was not. Bill sustained. *Penfield v. Skinner*, 11 Vt. 296, 298.

A meeting of drafted men was held and money contributed to relieve all from draft by hiring substitutes. No constitution or by-laws. Treasurer elected. At a later meeting it was voted that any surplus be given to charity. After war surplus given to defendant to establish a dispensary. Nine plaintiffs bring bill in equity to recover contributions. Held: Five were present at meeting that voted to give to charity

tions.¹² Individual members of an association do not upon dissolution acquire the rights of the association in a contract made with them as an association.¹³

As we have seen,¹⁴ title to personal property is in the association. So when a majority of the members vote to incorporate or combine with another organization,

and they cannot recover. The other four might sue treasurer who paid money to defendant, but not defendant because no privity of contract. Contributors to a fund placed in hands of trustees for a specific purpose have right in equity to surplus not needed for that object in proportion to contributions. *Abels v. McKeen*, 18 N. J. Eq. 462, 464.

In States where the doctrine of *cy pres* does not exist, when an unincorporated religious society ceases to exist, lands held in trust for it revert to the donor. *Pringle v. Dorsey*, 3 S. C. 502.

In the case of a burial ground, the heirs of those buried there were also said to have an interest in the trust estate. Appeal of Gumbert, 110 Pa. St. 496, 1 Atl. 437.

¹² *Burke v. Roper*, 79 Ala. 138, 144.

A fund was raised by subscription for the assistance of the sick and wounded in the Balkan war. Subscriptions were received at different times and were applied by the trustees. After the war there was an unexpended balance. Held: The rule of Clayton's case, 1 Merivale 572, 608, is inapplicable, and the balance belongs to all the subscribers in proportion to their subscriptions irrespective of date. *British Red Cross Soc. v. Johnson*, (1914) 2 Ch. 419.

¹³ Expelled members of a church organized separately and by agreement between the two churches the property was to be used by both. Later the new church disbanded and its individuals attempted to reorganize and enforce rights under the agreement. Held: The agreement was with the church as a society, the rights conferred cannot exist after the society has been dissolved. The members individually did not acquire the rights of the church when it disbanded. *Berryman v. Reese*, 50 Ky. 287, 290.

A college had contracted that its trustees should be elected by the synod of Kentucky, which was defined to be that body which is connected with the General Assembly of the Presbyterian church of the U. S. A. During the war the synod split and one party adhered to the General Assembly and maintained its organization. The other joined another national organization. Both synods elected trustees of the college. One set of trustees brought bill to enforce its rights to the office. Held: The contract clearly defines the synod which has the power to elect and there has been no breach in the continuity of it. No question of majority rule can be considered. *Kinthead v. McKee*, 72 Ky. 535.

¹⁴ See § 60, note 45.

those who insist on keeping up the old organization, however few, are entitled to its property.

§ 70. Parties in Litigation

Just as a partnership at common law cannot sue or be sued in its firm name, so an association not organized for profit cannot appear as a party in court as an association.¹ Its members should be joined as individuals.² If, by mistake, the association is named as a

¹ *Thurmond v. Cedar Springs Baptist Church*, 110 Ga. 816, 36 S. E. 221; *Cain v. Armenia Lodge*, 12 Ga. App. 251, 77 S. E. 184; *Mackenzie v. Edinburg Board of School Trustees*, 72 Ind. 189; *Furniture Co. v. Union*, 165 Ind. 421, 423, 75 N. E. 877 (trade union); *Nightingale v. Barney*, 4 Ia. 106 (Masonic lodge); *Hanley v. Telephone Co.*, 150 Ia. 198, 129 N. W. 807, 808; *Workingmen's Bank v. Converse*, 29 La. Ann. 369, 370; *Littleton v. I. O. U. A. M.*, 98 Md. 453, 56 Atl. 798; *Pickett v. Walsh*, 192 Mass. 572, 590, 78 N. E. 753 (trade union); *Detroit Schuetzen Band v. Detroit Agitations Verein*, 44 Mich. 313, 6 N. W. 675; *Typothetae v. Union*, 94 Minn. 351, 102 N. W. 725, 727; *Cleland v. Anderson*, 66 Neb. 252, 272, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; *Bossert v. Dhuy*, 151 N. Y. S. 877 (App. Div.) (trade union); *Church v. Clifton*, 34 Tex. Civ. App. 248, 78 S. W. 732; *Home Benefit Ass'n v. Weston*, 146 S. W. 1022 (Tex. App.); *Small v. Federation*, 5 Ont. L. R. 456, 458 (trade union); *Kingston v. Salvation Army*, 6 Ont. L. R. 406, 411, aff'd 7 Ont. L. R. 681.

Where a trade union was used as such and enjoined, it could not for the first time raise the question of proper parties on the contempt proceeding. *Barnes Co. v. Chicago Union*, 232 Ill. 402, 83 N. E. 932.

An unincorporated church cannot sue in its association name, but may elect trustees to do so. *Arts v. Guthrie*, 75 Ia. 674, 677, 37 N. W. 395.

An action cannot be instituted in the name of an unincorporated church "by" certain designated officers unless it has complied with the statute requiring registration of the name, style and object of the association. *Mutual Life Co. v. Inman Parks Church*, 111 Ga. 677, 679, 36 S. E. 880.

Churches in West Virginia cannot be incorporated and so cannot sue or be sued as such. *Lunsford, etc. Co. v. Wren*, 64 W. Va. 458, 465, 63 S. E. 308.

² Suit against labor union to restrain boycott. *Seattle Co. v. Hansen*, 144 Fed. 1011 (C. C. — Cal.); *Soller v. Mouton*, 3 La. Ann. 541; *Lilly v. Tobbein*, 13 S. W. 1060 (Mo.) (church); *Schmidt v. Gunther*, 5 Daly 452 (N. Y.).

At common law, apart from statute, all members of an unincorporated fraternal order must sue on a bond given to it in its associa-

party, in some States an amendment to the names of individual members is held improper.³ When the members were named as individuals it has been held not improper practice to add the name of the association "to distinguish them in their associated capacity,"⁴ but the association as such should not execute an appeal bond for them.⁵

If a plaintiff brings an action against only part of the members, they may plead that fact in abatement,⁶

tion name. Misnomer in the bond may be cured by evidence that the association commonly was known by that name. *O'Connell v. Lamb*, 63 Ill. App. 652, 656.

A note and mortgage was made to the Southwestern Baptist Association. Held: An action on it by the members of the executive board of the association should be dismissed. If not a corporation, the members of the association should sue as partners. *Jones v. Watson*, 63 Ga. 679.

³ *Maisch v. O. A.*, 223 Pa. St. 199, 200, 72 Atl. 528 (benefit society); *Nunn v. Louisville*, 31 Ky. Law Rep. 1293, 105 S. W. 119, 121 (statute of limitations had run).

But when an association had been incorporated and by mistake suit was brought by the corporation, an amendment was allowed after the statute of limitations had run bringing in members of the association as plaintiffs. *Lilly v. Tobbein*, 13 S. W. 1060, 1062 (Mo.).

Where union and some members were summoned as defendants, they were ordered to amend and aver that the individuals were members of the association. *American, etc. Co. v. Wire Drawers, etc. Union*, 90 Fed. 598, 600.

Masonic lodge which had been incorporated sued to escape taxation as a charitable corporation but the plaintiff as described was an unincorporated association. Held: Against defendant's objection cannot amend so as to make the corporation plaintiff, for that would be to insert a new party. *Marsh River Lodge, F. & A. M. v. Brooks*, 61 Me. 585, 587.

⁴ *Hanley v. Telephone Co.*, 150 Ia. 198, 129 N. W. 807, 808 (farmers' telephone line); *S. v. Live Stock Exchange*, 211 Mo. 181, 109 S. W. 675.

⁵ *Underwriters v. Mercantile Co.*, 131 Ill. App. 617, 620.

⁶ *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (trade union); *Robinson v. Robinson*, 10 Me. 240, 243; *Hogdon v. Gardner*, 2 Ohio Cir. Court 340, 343; see *Richardson v. Hastings*, 7 Beav. 201, 323, 11 Beav. 17.

Members of live stock exchange expelled must join all the directors. *Greer v. Stoller*, 77 Fed. (C. C. — Mo.).

In an action on a note given by an association to one of its members and endorsed by certain others brought against the endorsers,

but in that case the defendant must aver who are the proper parties.⁷

In suits in equity, where the members are numerous, however, the usual equity rule is applied and a few are allowed to sue on behalf of themselves and all others who may join.⁸ Those who sue on an obligation due the association must show their authority to act for the rest.⁹ The petition should set forth facts to justify such

Held: All members should be brought in as partners and all rights settled in one proceeding. *Conway v. Zender*, 154 Wis. 479, 143 N. W. 162.

⁷ *Humbert v. Abeel*, 7 N. Y. Civ. Proc. 417.

⁸ *Beatty v. Kurtz*, 2 Pet. 566, 584 (church); *Callsen v. Hope*, 75 Fed. 758, 760 (D. C. — Alaska) (bill by members of a church to enjoin trespass on its real estate); *Whitney v. Mayo*, 15 Ill. 251, 255 (church); *Pipe v. Bateman*, 1 Ia. 369 (emigrant aid society); *McConnell v. Gardner*, Morr. 272 (Ia.) (church); *Payne v. Lodge*, 115 S. W. 764 (Ky.) (lodge); *Birmingham v. Gallagher*, 112 Mass. 190, 192 (benefit society); *Snow v. Wheeler*, 113 Mass. 179, 185 (trade union); *Lilly v. Tobbein*, 13 S. W. 1060, 1062 (Mo.) (religious association); *Bloets v. Simon*, 12 N. Y. Civ. Proc. 114, 19 Abb. N. C. 88 (N. Y.) (trade union suit under code); *Marshall v. Loveless*, 1 N. C. 325 (one member sued); *Liggett v. Ladd*, 17 Ore. 89, 94, 21 Pac. 133 (church); *Liederkrantz Singing Society v. Germania Turn-Verein*, 163 Pa. St. 265, 268, 29 Atl. 918 (music club); *Nance v. Busby*, 91 Tenn. 303, 315, 18 S. W. 874 (church); *Perkins v. Siegfried*, 97 Va. 444, 450, 34 S. E. 64; *Smith v. Nelson*, 18 Vt. 511, 568 (one member sued); *Lloyd v. Loaring*, 6 Ves. Jr. 773, 776 (Masonic lodge).

Defendant signed a subscription paper towards improvements on a Catholic church. Paper named no payee. Title to the property was in the bishop. He sued as bishop for himself and the St. T. Church, a religious association unincorporated, the members of which are too numerous to be brought before the court. Held: Proper plaintiff. *Egan v. Bonacum*, 38 Nebr. 577, 579, 57 N. W. 288.

⁹ *Determann v. Luehrsmann*, 74 Ia. 275, 278, 37 N. W. 330 (church); *Smith v. Pinney*, 86 Mich. 484, 493, 49 N. W. 305 (church).

It has also been said that such practice will be permitted "if with the consent or by the direction of the rest or a majority of them." *Payne v. Lodge*, 115 S. W. 764 (Ky.). See *Marshall v. Loveless*, 1 N. C. 325, *Cameron and Nor*, 217, 284.

Bill by member of religious association dismissed because it did not appear to be brought at the instance of a majority of the church or a majority of the male members, but at the election of one member only, which is insufficient in the case of a private charity. *Parker v. May*, 5 Cush. 336, 351.

The deacons of a Baptist church as such have no power to sue with

a course.¹⁰ The practice in some States has been extended to actions at law.¹¹ So where the defendants are alleged to be numerous, a few may be joined,¹² and an injunction against them as individuals will restrain illegal action by them in their associate capacity¹³ and will bind all who have notice whether parties or not.¹⁴ It is always a question for the court whether those brought in are fairly representative.¹⁵ In a bill in equity by a member of a benefit society to collect a benefit payment out of the funds of the order it was held suf-

respect to church property, control of which rests in the congregation. *Drew v. Hogan*, 26 App. D. C. 55, 59.

¹⁰ *McConnell v. Gardner*, Morr. 272 (Ia.) (church). In representative actions the nature of the common interest must appear. *Habicht v. Pemberton*, 4 Sand. 657 (N. Y.).

¹¹ *Klein v. Rand*, 35 Pa. Sup. Ct. 263, 267; *Stemmerman v. Lilienthal*, 54 S. C. 440, 448, 32 S. E. 535 (under code). But see *Habicht v. Pemberton*, 4 Sand. 657, 658 (N. Y.). In the absence of statute it has been refused. *Westbrook v. Griffin*, 132 Ia. 185, 187, 109 N. W. 608 (farmers' telephone line).

¹² *Smith v. Swormstedt*, 16 How. 288, 302 (religious society); *Evenson v. Spaulding*, 150 Fed. 517, 523 (C. C. A.) (unfair competition); *Gorman v. Russell*, 14 Cal. 531, 539 (mutual benefit association); *Fitzpatrick v. Rutter*, 160 Ill. 282, 286, 43 N. E. 392 (trade union); *Union v. Barnes*, 134 Ill. App. 11, 18 (contempt against union); *Keller v. Tracy*, 11 Ia. 530 (church); *Pickett v. Walsh*, 192 Mass. 572, 590, 78 N. E. 753 (trade union); *Van Houten v. Pine*, 36 N. J. Eq. 133, 138 (Masonic benefit society, "It is enough if so many be made parties as to insure a fair and honest trial," president and treasurer enough); *Kimball v. Lower Columbia Ass'n*, 67 Ore. 249, 135 Pac. 877 (church); *Branson v. I. W. W.*, 30 Nev. 270, 95 Pac. 354 (trade union. At law, by statute); *Roofing Co. v. Int. Ass'n*, 5 Ont. L. T. 424, 9 Ont. L. R. 171, 178 (tort for conspiracy against trade union).

¹³ *American Steel, etc. Co. v. Wire Drawers, etc. Union*, 90 Fed. 598, 603.

¹⁴ *American Steel, etc. Co. v. Wire Drawers, etc. Union*, 90 Fed. 598, 604.

¹⁵ "In the case of an organized strike of laborers it is fair enough if the leaders of the strike be brought in to represent the organization no matter what their official relation to the society may be." Duly elected officers for that purpose will suffice as plaintiffs but cannot be made requisite as defendants. *American Steel, etc. Co. v. Wire Drawers, etc. Union*, 90 Fed. 598, 607.

Service on members who did not authorize the torts will not justify an injunction against others not served. *Hill v. Eagle Co.*, 219 Fed. 717 (C. C. A. — W. Va.).

ficient to join as defendant the treasurer, who was in possession of the funds as trustee and its chief executive officer.¹⁶

A treasurer of an association as such cannot sue to recover property of which the by-laws give him custody.¹⁷ But officers can sue on obligations running to them as officers.¹⁸ It is no objection that both plaintiff and defendant are members of the same association.¹⁹

By statute in several States unincorporated associations like corporations may sue and be sued in their association names.²⁰ In New York an association of

¹⁶ The proceeding was said to be in the nature of the establishment of an equitable lien. *Colley v. Wilson*, 86 Mo. App. 396, 402; *Harris v. Wilson*, 86 Mo. App. 406, 420.

President and treasurer sufficient. Payment ordered out of surplus. *Van Houten v. Pine*, 36 N. J. Eq. 133, 137.

¹⁷ *Develle v. Plummer*, 5 Col. App. 113, 37 Pac. 947.

¹⁸ *Hecker v. Cook*, 20 Col. App. 282, 78 Pac. 311 (bond running to treasurer); *Whitcomb v. Smart*, 38 Me. 264, 266 (note to "E. W., P. S. of A." of a lodge. Suit properly brought in his name though he had retired from office); *Bridenbaker v. Hoard*, 32 How. Pr. 289 (N. Y.) (authority by statute to sue); *Rhodes v. Maret*, 45 Tex. Civ. App. 593, 101 S. W. 278.

Upon a written promise to pay money "to the treasurer of" an unincorporated society, the members of the society, not the treasurer, are the proper parties plaintiff. *Ewing v. Medlock*, 5 Porter 82 (Ala.).

An unincorporated company borrowed money and took a note to the order of "the Captain of Company A." At the time of suit there was no captain and by vote of the company the note was transferred to plaintiff to hold and collect for the company. Held: This gave him sufficient interest to maintain the bill. (Query, if bill in equity.) *Waugh v. Anel*, 21 Ill. App. 389.

The treasurer of an unincorporated church may sue in his own name on subscriptions made to him as treasurer for building a church if in pursuance of the subscription he had commenced the construction. The words "as treasurer," etc., the association having no corporate existence, may be regarded as surplusage. *McDonald v. Gray*, 11 Ia. 508.

Statute required a society to file certificate with clerk of election of trustees. Held: This not condition precedent to action by trustees on claim of the society. Hence, society cannot sue again claiming former suit invalid. *Roberts v. Hill*, 137 Ind. 215, 36 N. E. 843.

¹⁹ *Whitcomb v. Smart*, 38 Me. 264, 266.

²⁰ *Ex parte Hill*, 165 Ala. 365, 369, 51 So. 786.

The association is the only proper defendant. Judgment binds prop-

over seven members may sue and be sued in the name of its president,²¹ but action may still be brought against all the members as at common law,²² or by a few on behalf of all.²³ Apart from these statutes an association in

erty of the association only. *Davidson v. Knox*, 67 Cal. 143, 146, 7 Pac. 413; *Mokelumne Co. v. Knox*, 7 Pac. 415 (Cal.).

But see *Gieske v. Anderson*, 77 Cal. 247, 248, 19 Pac. 421, where a treasurer of an association was allowed to sue a former treasurer for funds he had retained.

If statute does not take away right to sue individuals, it is not unconstitutional. *Heater Co. v. Union*, 129 Mich. 354, 362, 88 N. W. 889.

Powhatan Steamboat Co. v. Potomac Steamboat Co., 36 Md. 238, 244; *Littleton v. I. O. U. A. M.*, 98 Md. 453, 56 Atl. 798; *Cornfield v. Order Brith Abraham*, 64 Minn. 261, 263, 66 N. W. 970; *Saunders v. Am. Express Co.*, 71 N. J. L. 270, 57 Atl. 899, 58 Atl. 1101; *King v. Nichols*, 2 Ohio Dec. (reprint) 564.

By statute in Massachusetts an unincorporated church is entitled to receive and to sue for gifts and donations, so that an information in the name of the Attorney General is not an appropriate remedy for breach of trust with reference to its trust funds. *Attorney General v. Clark*, 167 Mass. 201, 204, 45 N. E. 183.

²¹ *Ruhl v. Ware*, 4 N. Y. S. 624; *Winter v. Hamm*, 5 N. Y. Civ. Proc. 194, 196; *Cohn v. Borst*, 36 Hun 562; *McGlynn v. Post*, 21 Abb. N. C. 97.

By statute in New York creditors of a joint stock association must first sue the president and collect out of the assets of the association. If they cannot collect, then they may sue individual members of association. The recovery in the first suit is not made conclusive in the second. The association here was liable as undisclosed principal for the acts of its superintendent. But since undisclosed, the liability did not continue after it had transferred its assets to a corporation. Like dormant partners, not bound to give notice of termination of authority. If had been known as principal, notice of termination of authority would have been necessary. *Allen v. Clark*, 65 Barb. (N. Y.) 563, 574, 575.

Statute authorized action by president of voluntary association regardless of whether members of association reside or transact their business in the State. *Clancy v. Terhune*, 1 N. Y. City Ct. 239. See *Coombe v. Harford*, 99 Me. 426, 433, 59 Atl. 529.

"As between an individual member on the one hand and the association in its official capacity on the other, the association is to be regarded as a *quasi* corporation capable of being sued by such member for any breach of its official obligations. (Under code.) Expulsion. *Winter v. Hamm*, 5 N. Y. Civ. Proc. 194, 196.

²² *Schwartz v. Welcher*, 20 N. Y. S. 861; *Peckham v. Wentworth*, 116 N. Y. S. 781.

²³ *Bloete v. Simon*, 12 N. Y. Civ. Proc. 114, 19 Abb. N. C. 88; *Rourke v. Drug Co.*, 77 N. Y. S. 373, 75 App. Div. 145.

Action for conspiracy and combination to prevent plaintiff from car-

New York cannot sue.²⁴ In Massachusetts a trade union may sue by an officer to enjoin unlawful use of its trade mark, the union label.²⁵

A statute providing for service of process on an agent of an unincorporated association does not deprive members of their rights without due process of law.²⁶

The usual rules of evidence are applied.²⁷

Thus the books of the association are admissible evidence to prove its action.²⁸ When the defendant failed to produce under subpoena its constitution and

rying on his trade. One of defendants was named as president of association as well as an individual. On demurrer it was contended that under the statute the plaintiff could not sue members of an unincorporated association of more than seven members when action is also brought against its president or treasurer till after final judgment in that latter action. Held: Statute applies only to the liability of members of the association as such. May sue association and individual members in same action on a personal liability of the member. *April v. Baird*, 52 N. Y. S. 973, 32 App. Div. 226, 28 N. Y. Civ. Proc. 29.

²⁴ *Hawke v. Cigar Makers' Union*, 58 N. Y. S. 412.

Apart from statute an unincorporated fire company cannot sue in the name of its foreman and recover possession of an engine from another fire company. Statute did not apply here. *Masterson v. Botts*, 4 Abb. Pr. (N. Y.) 130.

Under certain statutes an association could not sue as the real party in interest under an express trust created by the statutes because the statute gave the rights to the members of the association as individuals, and not as an association. *Corning v. Greene*, 23 Barb. (N. Y.) 33, 45.

²⁵ *Tracy v. Banker*, 170 Mass. 266, 49 N. E. 308.

²⁶ *Appeal of Baylor*, 93 S. C. 414, 77 S. E. 59.

²⁷ Printed copy of minutes of meetings identified by secretary of church were properly admitted. *Godfrey v. Walker*, 42 Ga. 562, 571.

Opinion of officers as to meaning of by-laws inadmissible when free from ambiguity. *Brendon v. Worley*, 28 N. Y. S. 557, 8 Misc. 253.

Under by-laws no dissolution of association should occur so long as sixty voted to maintain it, in an action arising out of an attempt of the majority to consolidate, evidence of members voting against consolidation should have been admitted. *Rosenthal v. Reinfeld*, 96 N. Y. S. 199, 48 Misc. 652.

Testimony of a witness as to the number of members of a congregation that desired affiliation with a certain church organization held improperly excluded. *Dochkus v. Lithuanian Soc.*, 206 Pa. St. 25, 30, 55 Atl. 779.

²⁸ *Francis v. Perry*, 144 N. Y. S. 167, 82 Misc. 271.

by-laws, oral evidence as to the manner of its organization and its membership were admitted.²⁹

On the issue whether a certain book was a church record or a private memorandum of the pastor, the court said: "It appears that during the whole time it was kept, Dr. Puffer was the minister of the parish and pastor of the church, that the book was kept wholly or principally by him, and that the pastor is the proper officer to keep such a record. On inspection, it appears to be a regular statement, in proper form for a record, of the admission of members, the choice of officers, and the transaction of the ordinary business of the church. We must take notice of a usage so general as that of a church to keep a record. It is also to be considered, that the law recognizes the existence and organization of a church as an aggregate body, takes notice of its acts and doings and annexes thereto various civil rights and powers. It is in virtue of this organization and these proceedings that deacons are elected; and being thus elected, they are empowered and qualified by the law to sue as a corporation. The law therefore does, by necessary implication, authorize and require a church, by a proper officer, to keep some record of its acts." The book was held a church record.³⁰

²⁹ *Haden v. Clark*, 10 N. Y. S. 291, 32 N. Y. St. 478.

³⁰ *Sawyer v. Baldwin*, 11 Pick. 492, 493.

APPENDIX OF FORMS

Note

It seems desirable in connection with a work on the law of associations intended primarily for use by practitioners to include forms of the indentures of trust which are used by modern business organizations. A collection of such forms is therefore printed in this appendix. In using them, however, the reader should bear in mind that owing to the great flexibility of this form of organization the trust instruments under which they are instituted are of great variety and usually contain some modification made with a view to the peculiar circumstances of the enterprise to be undertaken in a given instance. For this same reason, however, it is difficult to prepare normal forms suitable for use without change under all circumstances. It has seemed best, therefore, to print in this appendix copies of instruments which have actually been used. These will serve to illustrate for the reader the kind of association referred to in the text and the essential features of each will be readily identified by one desiring to frame a new instrument along the same lines.

The forms herein are of three sorts. The trust deed of the original Standard Oil Trust (Appendix p. 318) is included chiefly for historical reasons because it was one of the first of these instruments to come under the review of the courts. It is also interesting to compare this early form with the more highly developed modern forms. It is the instrument referred to in *State v. Standard Oil Co.*, 49 Ohio St. 137 and *Rice v. Rockefeller*, 134 N. Y. 174. The deed of the original sugar trust will be found in *People v. North River Sugar Refineries*, 102 N. Y. 582. There are also included the indentures of trust which were before the Court in some of the important recent cases. These instruments are not printed in full in the reports of the opinions of the Court but are found in the original papers.

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Since they are inaccessible to most attorneys it seems desirable to print them here because the distinction between partnership and trust as laid down in the recent cases depends upon the form these instruments have taken. These are the Copley Square Trust (Appendix p. 329) passed on in the case of *Williams v. Boston*, 208 Mass. 497; the Park Square Trust (Appendix p. 342) passed on in the case of *Williams v. Johnson*, 208 Mass. 544; the Boston Personal Property Trust (Appendix p. 352) passed on in the case of *Williams v. Milton*, 215 Mass. 1; and the declaration of trust and "by-laws" passed on in the case of *Frost v. Thompson*, 219 Mass. 360 (Appendix p. 363).

In addition to these are printed a form of indenture of trust for a holding company holding securities of public service corporations (Boston Suburban Electric Companies, Appendix p. 373); a manufacturing company (The Ludlow Manufacturing Associates, Appendix p. 388); a form of indenture of trust for the construction and ownership and management of a building (Blank Hotel Trust, Appendix p. 400); and a form for an industrial enterprise (The North American Companies, Appendix p. 424). In connection with these, forms for limitation of liability to be inserted in leases (Appendix p. 454) and bonds (Appendix p. 455) are included. The forms for resignation and appointment of new trustees are simple and easily drawn by reference to the terms of the particular instrument of trust. It is highly important, however, that the draftsman should assure himself that the procedure strictly conforms to the requirements of the trust instrument. It is usually required where real estate is involved that a formal certificate, or certificates, showing the change of trustee be recorded in the appropriate registry of deeds. These also are simple instruments forms for which are printed (Appendix p. 361), but it is essential that they follow strictly the terms of the indenture of trust, otherwise much annoyance will be caused in future examinations of title.

In connection with the use of these forms it is important for the practitioner to bear in mind that even in Massachusetts, where the law has been most fully developed, the application of the distinction between partnership and trust to the different provisions of these instruments is not yet entirely clear, and that most of the forms now in use, in-

NOTE

cluding most of those printed herein, are of date prior to the decision of *Williams v. Milton*, 215 Mass. 1, and all of them prior to *Frost v. Thompson*, 219 Mass. 360, the latter case apparently holding that power to remove trustees at any time and appoint successors and to amend the declaration of trust when vested in shareholders are sufficient to make the shareholders partners and not mere beneficiaries to the trust. (All of these cases are discussed in Sec. 14). The indenture of the Boston Personal Property Trust, which is a somewhat unusual form (Appendix p. 352), is the only one which has been distinctly held to be a trust and not a partnership. In that same case there was a dictum that the declaration of trust of the Park Square Trust (Appendix p. 342) was a trust and not a partnership, although in the case of *Williams v. Johnson*, 208 Mass. 544, there had been a previous dictum that this same declaration created a partnership. The tendency probably will be either to eliminate the right of association of shareholders in meetings or to substitute for the power to direct and remove trustees and terminate the trust by affirmative vote binding on the trustees, authority to the trustees to do these acts with the consent of the shareholders expressed by vote at a meeting.

The form of bond of the Blank Electric Companies (Appendix p. 455) is an attempt to avoid the objection that an obligation payable out of a specific fund is not negotiable. It is made payable to a named person who assigns it in blank. The holder who filled in his name would at least have prima facie title in an action on it.

There is also printed herein a form of constitution and by-laws of a famous social club. It is on forms such as these that are based the great variety of instruments organizing non-profit associations.

A

STANDARD OIL TRUST

(*State v. Standard Oil Co.*, 49 Ohio St. 137; *Rice v. Rockefeller*, 134 N. Y. 174)

THIS AGREEMENT, made and entered upon this second day of January, A.D. 1882, by and between all the persons who shall now or may hereafter execute the same as parties thereto, witnesseth:

I. It is intended that the parties to this agreement shall embrace three classes, to-wit:

1. All the stockholders and members of the following corporations and limited partnerships, to-wit:

Acme Oil Company (New York); Acme Oil Company (Pennsylvania); Atlantic Refining Company, of Philadelphia; Bush & Co., limited; Camden Consolidated Oil Company; Elizabethport Acid Works; Imperial Refining Company, limited; Chas. Pratt & Co.; Paine, Ablett & Co., limited; Standard Oil Company (Ohio); Standard Oil Company (Pittsburg); Smith's Ferry Oil Trans. Company; Solar Oil Company, limited; Stone & Fleming Manufacturing Company, limited.

Also, all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

2. The following individuals, to-wit:

W. C. Andrews, Jno. D. Archbold, Lide K. Arter, J. A. Bostwick, Benj. Brewster, D. Bushnell, Thos. C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, H. M. Harma and Geo. W. Chapin, D. M. Harkness, D. H. Harkness, trustee, S. V. Harkness, John Huntington, H. A. Hutchins, Chas. F. G. Heye, O. B. Jennings, Chas. Lockhart, A. M. McGregor, Wm. H. Macy, Wm. H. Macy, Jr., Estate of Josiah Macy, Jr., Wm. H. Macy, Jr., executor, O. H. Payne, O. H. Payne, trustee, Chas. Pratt, Horace

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A. Pratt, C. M. Pratt, A. J. Pouch, John D. Rockefeller, Wm. Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandergrift, William T. Wardwell, W. G. Warden, Jos. L. Warden, Warden, Frew & Co., Louise C. Wheaton, Julia H. York, and Geo. H. Vilas, M. R. Keith, and Geo. F. Chester, trustees.

Also, all such individuals as may hereafter join in this agreement at the request of the trustees herein provided for.

3. A portion of the stockholders and members of the following corporations and limited partnerships, to-wit:

American Lubricating Oil Co., Baltimore United Oil Co., Beacon Oil Co., Bush & Denslow Manufacturing Co., Central Refining Co., of Pittsburg, Chesebrough Manufacturing Co., Chess Carley Co., Consolidated Tank Line Co., Inland Oil Co., Keystone Refining Co., Maverick Oil Co., National Transit Co., Portland Kerosene Oil Co., Producers' Consolidated Land and Petroleum Co., Signal Oil Works, limited, Thompson & Bedford Co., limited, Devoe Manufacturing Co., Eclipse Lubricating Oil Co., limited, Empire Refining Co., limited, Franklin Pipe Co., limited, Galena Oil Works, limited, Galena Farm Oil Co., limited, Germania Mining Co., Vacuum Oil Co., H. C. Van Tine & Co., limited, and Waters-Pierce Oil Co.

Also, stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

II. The parties hereto do covenant and agree to and with each other, each in consideration of the mutual covenants and agreements of the others, as follows:

1. As soon as practicable, a corporation shall be formed in each of the following states under the laws thereof, to-wit: Ohio, New York, Pennsylvania and New Jersey; provided, however, that instead of organizing a new corporation, any existing charter and organization may be used for the purpose when it can advantageously be done.

2. The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine and deal in petroleum and all its products and all the materials used in such businesses, and transact other business collateral thereto. But other purposes and powers shall be embraced

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in the several charters, such as shall seem expedient to the parties procuring the charter, or, if necessary to comply with the law, the powers aforesaid may be restricted and reduced.

3. At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other states and territories.

4. Each of said corporations shall be known as the Standard Oil Company of _____ (and here shall follow the name of the state or territory by virtue of the laws of which said corporation is organized).

5. The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same, in view of the purpose to be accomplished.

6. The shares of stock of each of said corporations shall be issued only for money, property or assets, equal at a fair valuation to the par value of the stock delivered therefor.

7. All of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred to and vested in the said several Standard Oil Companies. All of the property, assets and business in, or of, each particular state, shall be transferred to and vested in the Standard Oil Company of that particular state, and in order to accomplish such purpose, the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first, are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement), to sell, assign, transfer, convey and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets and business of said corporations and limited partnerships. Correct schedules of such property, assets and business shall accompany each transfer.

8. The individuals embraced in class second of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey and set over all the property, real and personal, assets and business

STANDARD OIL TRUST

mentioned and embraced in schedules accompanying such sale and transfer to the Standard Oil Company or companies, of the proper state or states, as soon as the said corporations are organized and ready to receive the same.

9. The parties embraced in class third of this agreement do covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named, to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter take the assignment of stocks in the same or similar companies upon the terms herein provided, and that whenever and as often as all the stocks of any corporation or limited partnership are vested in said trustees, the proper steps may then be taken to have all the money, property, real and personal, of such corporation or partnership assigned and conveyed to the Standard Oil Company of the proper state, on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the Standard Oil Companies equal to the value of the money, property and business assigned, to be held in place of the stocks of the company or companies assigning such property.

10. The consideration for the transfer and conveyance of the money, property and business aforesaid to each or any of the Standard Oil Companies, shall be stock of the respective Standard Oil Company to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property and business so transferred. Said stock shall be delivered to the trustees hereinafter provided for, and their successors, and no stock of any of said companies shall ever be issued except for money, property or business equal at least to the par value of the stock so issued, nor shall any stock be issued by any of said companies for any purpose, except to the trustees herein provided for, to be held subject to the trusts hereinafter specified. It is understood, however, that this provision is not intended to restrict the purchase, sale and exchange of property by said Standard Oil Companies as fully as they may be authorized to do by their respective charters, provided only that no stock be issued therefor except to said trustees.

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11. The consideration for any stocks delivered to said trustees as above provided for, as well as for stocks delivered to said trustees by persons mentioned or included in class third of this agreement, shall be the delivery by said trustees to the persons entitled thereto, of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said Standard Oil Companies so received by said trustees, and equal to the appraised value of the stocks of other companies or partnerships delivered to said trustees. (The said appraised value shall be determined in a manner agreed upon by the parties in interest and the said trustees.) It is understood and agreed, however, that the said trustees may, with any trust funds in their hands, in addition to the mode above provided, purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of said Standard Oil Companies, on such terms and in such mode as they may deem advisable, and shall hold the same for the benefit of the owners of said trust certificates, and may sell, assign, transfer and pledge such bonds and stocks whenever they may deem it advantageous to said trust so to do.

III. The trusts upon which said stocks shall be held, and the number, powers and duties of said trustees, shall be as follows:

1. The number of trustees shall be nine.
2. J. D. Rockefeller, O. H. Payne and Wm. Rockefeller are hereby appointed trustees, to hold their office until the first Wednesday of April, A.D. 1885.
3. J. A. Bostwick, H. M. Flagler and W. G. Warden are hereby appointed trustees, to hold their office until the first Wednesday of April, A.D. 1884.
4. Chas. Pratt, Benj. Brewster and Jno. D. Archbold are hereby appointed trustees, to hold their office until the first Wednesday of April, A.D. 1883.
5. Elections for trustees to succeed those herein appointed shall be held annually, at which election a sufficient number of trustees shall be elected to fill all vacancies occurring either from expiration of the term of the office of trustee or from any other cause. All trustees shall be elected to hold their office for three years, except those elected to fill a vacancy arising from any cause, except expiration of term, who shall be elected for the balance of the term of the trustee

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whose place they are elected to fill. Every trustee shall hold his office until his successor is elected.

6. Trustees shall be elected by ballot by the owners of trust certificates or their proxies. At all meetings the owners of trust certificates, who may be registered as such on the books of the trustees, may vote in person or by proxy and shall have one vote for each and every share of trust certificates standing in their names, but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books may be closed for thirty days immediately preceding the annual election. A majority of the shares represented at such election shall elect.

7. The annual meeting of the owners of the said trust certificates for the election of trustees, and for other business, shall be held at the office of the trustees, in the city of New York, on the first Wednesday of April of each year, unless the place of meeting be changed by the trustees, and said meeting may be adjourned from day to day until its business is completed. Special meetings of the owners of said trust certificates may be called by the majority of the trustees at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of holders of trust certificates whenever requested to do so by a petition signed by the holders of ten per cent. in value of such certificates. The business of such special meetings shall be confined to the object specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given, by personal notice as far as possible, and by public notice in one of the principal newspapers of each state, in which a Standard Oil Company exists, at least ten days before such meeting. At any meeting, a majority in value of the holders of trust certificates represented consenting thereto, by-laws may be made, amended and repealed, relative to the mode of election of trustees and other business of the holders of trust certificates, provided, however, that said by-laws shall be in conformity with this agreement. By-laws may also be made, amended and repealed at any meeting, by and with the consent of a majority in value of the holders of trust certificates, which alter this agreement relative to the number, powers and duties of the trustees, and to other

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matters tending to the more efficient accomplishment of the objects for which the trust is created, provided only that the essential intents and purposes of this agreement be not thereby changed.

8. Whenever a vacancy occurs in the board of trustees more than sixty days prior to the annual meeting for the election of trustees, it shall be the duty of the remaining trustees to call a meeting of the owners of Standard Oil Trust certificates for the purpose of electing a trustee or trustees to fill the vacancy or vacancies. If any vacancy occurs in the board of trustees, from any cause, within sixty days of the date of the annual meeting for the election of trustees, the vacancy may be filled by a majority of the remaining trustees, or, at their option, may remain vacant until the annual election.

9. If, for any reason, at any time, a trustee or trustees shall be appointed by any court to fill any vacancy or vacancies in said board of trustees, the trustee or trustees so appointed shall hold his or the respective office or offices only until a successor or successors shall be elected in the manner above provided for.

10. Whenever any change shall occur in the board of trustees, the legal title to the stock and other property held in trust shall pass to and vest in the successors of said trustees without any formal transfer thereof. But if at any time such formal transfer shall be deemed necessary or advisable, it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee or the administrator or executor of any deceased trustee to make said transfer.

11. The trustees shall prepare certificates which shall show the interest of each beneficiary in said trust, and deliver them to the persons properly entitled thereto. They shall be divided into shares of the par value of one hundred dollars each, and shall be known as Standard Oil Trust certificates, and shall be issued subject to all the terms and conditions of this agreement. The trustees shall have power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be signed, attested and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement and by the by-laws herein provided for.

STANDARD OIL TRUST

12. No certificates shall be issued except for stocks and bonds held in trust, as herein provided for, and the par value of certificates issued by said trustees shall be equal to the par value of the stocks of said Standard Oil Companies, and the appraised value of other bonds and stocks held in trust. The various bonds, stocks and monies held under said trust shall be held for all parties in interest jointly, and the trust certificates so issued shall be the evidence of the interest held by the several parties in this trust. No duplicate certificates shall be issued by the trustees, except upon surrender of the original certificate or certificates for cancellation, or upon satisfactory proof of the loss thereof, and in the latter case they shall require a sufficient bond of indemnity.

13. The stocks of the various Standard Oil Companies held in trust by said trustees, shall not be sold, assigned or transferred by said trustees, or by the beneficiaries, or by both combined, so long as this trust endures. The stocks and bonds of other corporations, held by said trustees, may be by them exchanged or sold and the proceeds thereof distributed pro rata to the holders of trust certificates, or said proceeds may be held and reinvested by said trustees for the purposes and uses of the trust; provided, however, that said trustees may, from time to time, assign such shares of stock of said Standard Oil Companies as may be necessary to qualify any person or persons, chosen, or to be chosen as directors and officers of any of said Standard Oil Companies.

14. It shall be the duty of said trustees to receive and safely to keep all interest and dividends declared and paid upon any of the said bonds, stocks and monies held by them in trust, and to distribute all monies received from such sources or from sales of trust property or otherwise, by declaring and paying dividends upon the Standard-Trust certificates as funds accumulated, which, in their judgment, are not needed for the uses and expenses of said trust. The trustees shall, however, keep separate accounts of receipts from interest and dividends, and of receipts from sales or transfers of trust property, and in making any distribution of trust funds, in which monies derived from sales or transfers shall be included, shall render the holders of trust certificates a statement showing what amount of the fund

APPENDIX OF FORMS

distributed has been derived from such sales or transfers. The said trustees may be also authorized and empowered by a vote of a majority in value of holders of trust certificates, whenever stocks or bonds have accumulated in their hands from money purchases thereof, or the stocks or bonds held by them have increased in value, or stock dividends shall have been declared by any of the companies whose stocks are held by said trustees, or whenever, from any such cause, it is deemed advisable so to do, to increase the amount of trust certificates to the extent of such increase or accumulation of values, and to divide the same among the persons then owning trust certificates pro rata.

15. It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable, over the other companies or partnerships, any portion of whose stock is held in said trust. It shall be their duty as stockholders of said companies to elect as directors and officers thereof, faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates.

16. All the powers of the trustees may be exercised by a majority of their number. They may appoint from their own number an executive and other committees. A majority of each committee shall exercise all the powers which the trustees may confer upon such committee.

17. The trustees may employ and pay all such agents and attorneys as they deem necessary in the management of said trust.

18. Each trustee shall be entitled to a salary for his services not exceeding twenty-five thousand dollars per annum, except the president of the board, who may be voted a salary not exceeding thirty thousand dollars per annum, which salaries shall be fixed by said board of trustees. All salaries and expenses connected with, or growing out of the trust, shall be paid by the trustees from the trust fund.

19. The board of trustees shall have its principal office in the city of New York, unless changed by vote of the trustees, at which office or in some place of safe deposit in said city, the bonds and stocks shall be kept. The trustees

STANDARD OIL TRUST

shall have power to adopt rules and regulations pertaining to the meetings of the board, the election of officers and the management of the trust.

20. The trustees shall render at each annual meeting, a statement of the affairs of the trust. If a termination of the trust be agreed upon as hereinafter provided, or within a reasonable time prior to its termination by lapse of time, the trustees shall furnish to the holders of the trust certificates a true and perfect inventory and appraisement of all stocks and other property held in trust, and a statement of the financial affairs of the various companies whose stocks are held in trust.

21. This trust shall continue during the lives of the survivors and survivor of the trustees in this agreement named and for twenty-one years thereafter; provided, however, that if at any time after the expiration of ten years, two-thirds of all the holders in value, or if after the expiration of one year, ninety per cent. of all the holders in value of trust certificates shall, at a meeting of holders of trust certificates called for that purpose, vote to terminate this trust at some time to be by them then and there fixed, the said trust shall terminate at the date so fixed. If the holders of trust certificates shall vote to terminate the trust as aforesaid, they may, at the same meeting or at a subsequent meeting called for that purpose, decide by a vote of two-thirds in value of their number the mode in which the affairs of the trust shall be wound up, and whether the trust property shall be distributed or whether it shall be sold and the values thereof distributed, or whether part, and if so, what part, shall be divided and what part shall be sold, and whether such sales shall be public or private. The trustees, who shall continue to hold their offices for that purpose, shall make the distribution in the mode directed, or, if no mode be agreed upon by two-thirds in value as aforesaid, the trustees shall make distribution of the trust property according to law. But said distribution, however made, and whether it be of property, or values, or of both, shall be just and equitable, and such as to insure to each owner of a trust certificate his due proportion of the trust property or the value thereof.

22. If the trust shall be terminated by expiration of the time for which it is created, the distribution of the trust

APPENDIX OF FORMS

property shall be directed and made in the mode above provided.

23. This agreement, together with the registry of certificates, books of accounts, and other books and papers connected with the business of said trust, shall be safely kept at the principal office of said trustees.

(Signatures omitted.)

B

COPLEY SQUARE TRUST

(Williams v. Boston, 208 Mass. 497)

UNDERWRITING SUBSCRIPTION AGREEMENT

With Moses Williams, J. Morris Meredith, and John P. Reynolds, Junior, and their successors, trustees under the Copley Square Trust Agreement, a copy of which is attached hereto marked "B," for shares of the Copley Square Trust.

In consideration of an underwriting commission of two (2) per cent. to be paid to each subscriber on the amount by him hereto underwritten and subscribed, — said commission to be payable at the time of the payment by the trustees to the Museum of Fine Arts of the first instalment of the purchase money under their contracts for the purchase of the Museum of Fine Arts property, copies of which contracts are appended hereto, marked "C" and "D" respectively, — and in order to enable said Trustees to enter into and perform said contracts "C" and "D," each of the parties who have set their names hereto hereby subscribes for the number of shares set opposite his signature, but only upon the following terms and subject to the following limitations, namely: —

The total initial issue of shares is to be twenty thousand (20,000) shares, of the par value of one hundred (100) dollars each, and this agreement is to be operative and binding only if said twenty thousand (20,000) shares are subscribed hereunder. The shares are to be paid for in four instalments, as follows: —

First instalment	June 15th, 1902,	thirty-five dollars per share
Second	" June 15th, 1904,	twenty-five " " "
Third	" June 15th, 1906,	" " " " " "
Fourth	" June 15th, 1907, 1908, or 1909,	

as the Trustees may determine to be necessary to enable them to make payment of the final instalment of the purchase price under said contracts "C" and "D," fifteen dollars per share.

APPENDIX OF FORMS

Each subscriber agrees for himself and his representatives to pay to the Trustees said first instalment of thirty-five (35) per cent. due June 15, 1902, on the number of shares by him subscribed hereunder. On the payment of said first subscription instalment, scrip therefor denoting thirty-five (35) per cent. paid will be issued by the Trustees. Said scrip shall represent the interest of the holder in the shares subscribed for by him and shall be transferable on the books of the Trustees. All scrip issued shall refer on its face to this agreement, and shall contain a stipulation that by acceptance thereof the holder accepts the provisions of this agreement in relation thereto.

For payment of the subsequent subscription instalments the Trustees shall call from time to time upon each scrip-holder of record at the time the call is made by sending at least ten (10) days' written notice by mail, postage prepaid to his address on their books. Upon each such call, each scrip-holder shall have the option either of paying with respect to the shares for which he has scrip the subscription instalment then called for payment or of permitting his scrip ownership and his interest in the shares represented thereby to lapse.

If he duly meets the call, he shall on surrender of his old scrip receive new scrip showing the total percentage paid up, and on payment of the call for the last instalment he shall receive full paid certificates of shares under said trust agreement.

Upon failure by any scrip-holder to pay any subscription instalment, continued for thirty days after written notice duly mailed to him as above provided, his scrip ownership shall lapse, and thereupon the scrip then standing in his name on the books of the Trustees shall vest in said Museum of Fine Arts in accordance with the "Agreement as to Lapse of Scrip" appended hereto, which forms a part of this agreement, and all sums already paid to the Trustees by any person upon the shares represented by said scrip shall be forfeited to the Trustees for the benefit of the Museum as owner of the lapsed scrip, and all right of the former scrip-holder to the shares represented by such scrip shall cease and become vested in said Museum.

All scrip when issued shall bear interest on the amount paid up at the rate of four (4) per cent. per annum, payable

COPLEY SQUARE TRUST

semi-annually July 1st and January 1st until the last instalment of the purchase price for said property bought from said Museum of Fine Arts under said contracts "C" and "D" has been paid.

It is intended that this agreement and said Trust Agreement shall take effect simultaneously, and only in the event that said Trustees shall execute said contracts "C" and "D" with said Museum of Fine Arts.

Witness the signatures and common seal of the subscribers this.....day of.....A.D. 1902.

Signatures.	Number of Shares	Address.
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APPROVAL AND ACCEPTANCE BY TRUSTEES

The provisions of the foregoing underwriting subscription agreement are hereby approved and the subscriptions thereunder are accepted, said contracts "C" and "D" with the Museum of Fine Arts for the purchase of its property having been executed simultaneously herewith.

(Signatures)

As Trustees of the Copley Square Trust,
But Not Individually.

"B"

AGREEMENT AS TO LAPSE OF SCRIP

As part of the transactions above set forth, and in consideration thereof, said Trustees as Trustees of the Copley Square Trust, but not individually, and said Museum of Fine Arts agree with each other as follows: —

The Trustees agree to notify in writing the Museum of every lapse of ownership of scrip under the terms of the above underwriting subscription agreement, and to issue to the Museum new scrip therefor upon satisfaction of the default thereon as next provided. The Museum agrees that it will within ten days after such notice at its option either pay to the Trustees the subscription instalment in default on such scrip or apply the amount of such subscription instalment toward the payment of any instalment of the purchase money then due, or, if none is due, upon the instal-

APPENDIX OF FORMS

ment next thereafter becoming due, interest to be adjusted; and thereafter, as each successive subscription instalment falls due, it will at its option, so pay the sum to the Trustees or apply the same on said purchase money so long as it remains the owner and holder of such scrip.

If, after due notice has been sent to the Museum, as above provided, of a lapse of ownership to any scrip or calling for the payment of any subscription instalments on such scrip already belonging to the Museum, as in the foregoing underwriting subscription agreement provided, the Museum neglects for ten days to make such payment, the amount unpaid on said scrip or the amount of the subscription instalment so called for, as the case may be, shall, without further acts of the parties, be applied as a partial payment on any instalment of the purchase money then due, or, if none is due, upon the instalment next thereafter becoming due, interest to be adjusted.

Any lapsed scrip issued to the Museum shall be transferable by the Museum, and, when transferred, shall again be subject to the provisions of the original agreement applicable to all scrip, and shall be taken to have been paid up to the extent to which subscription instalments have been either actually paid in cash or have been applied in partial payments of instalments of purchase money as above provided.

The Trustees agree to warrant and defend the title of the Museum to all lapsed scrip issued to it under this agreement, and to bear all the expense of defending said title, and in case the holder of any lapsed scrip for which the Trustees have issued new script to the Museum shall establish a title inconsistent with the title of the Museum to such new scrip said Trustees agree to indemnify the Museum against all loss thereby, including the payment of any sum credited on the purchase money in respect to such scrip, and the adjustment of interest.

In witness whereof the Trustees and the Museum of Fine Arts have executed this instrument, and said Trustees have affixed their seals and the Museum has affixed its seal hereto this day of A.D. 1902, said Trustees undertaking hereby only as Trustees of the Copley Square Trust, but not individually.

COPLEY SQUARE TRUST

“C”

COPLEY SQUARE TRUST AGREEMENT

DECLARATION OF TRUST made April . . . , 1902, establishing the Copley Square Trust, for the purchase, development, and disposition of a certain parcel of land with the buildings thereon, situated in Boston, Suffolk County and Commonwealth of Massachusetts, and bounded and described as follows: —

DESCRIPTION OF PROPERTY. Northerly on the southerly line of St. James Avenue as laid out and at present existing by three lines, one a straight line measuring 25 feet, another a curved line drawn with a radius of 198 25-100 feet, measuring 221 25-100 feet, and the third another straight line measuring 25 feet; westerly on the easterly line of Dartmouth Street, 350 feet; southerly on the northerly line of Stuart Street, 260 feet; and easterly on the westerly line of Trinity Place, 350 feet. Containing 95,268 square feet more or less. Subject to the restrictions and provisions so far as the same are now in force, imposed by an indenture between the City of Boston and the Museum of Fine Arts, dated October 26, 1899, and recorded with Suffolk Deeds, Libro 2642, Page 26, and by an Agreement contained in deed of said City to said Museum of Fine Arts, dated September 15, 1899, recorded with said Deeds, Libro 2634, Page 396.

We Moses Williams of Brookline in the County of Norfolk in said Commonwealth, J. Morris Meredith of said Boston, and John P. Reynolds, Junior, of Milton in said County of Norfolk, hereinafter called the “Trustees,” being about to make — simultaneously with the execution hereof — the contracts with the Museum of Fine Arts, a Massachusetts Corporation, for the purchase of the property above described, copies of which contracts are on file with the Old Colony Trust Co. of Boston, declare that we will, and our heirs, executors, administrators and assigns shall, hold said contracts and said property when conveyed to us and all monies and other property which may be received by the Trustees hereunder on the following trusts for the benefit of the holders from time to time of the scrip and shares hereinafter described.

TITLE OF TRUSTEES. 1. The title of the Trustees hereunder shall be “Trustees of the Copley Square Trust,” and

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this instrument may be referred to as the "COPLEY SQUARE TRUST AGREEMENT."

The word "Trustee" or "Trustees" wherever used in this instrument shall be taken to mean the trustee or trustees for the time being, howsoever appointed, except where it is otherwise provided.

GENERAL PURPOSES. 2. The general purposes of the trust are to make and carry out said contracts with the Museum of Fine Arts for the purchase of the property above described, and to manage and develop said property as hereinafter provided.

CAPITAL \$2,000,000. 3. The beneficial interest in the trust shall be divided into equal shares, each representing one hundred (100) dollars paid in. The Trustees shall issue to the several persons beneficially interested certificates stating the number of shares to the extent of which said persons are interested, and amounting in the aggregate to the total amount paid in by the beneficiaries. The total authorized issue shall be limited to twenty thousand (20,000) shares, aggregating two million (2,000,000) dollars; and the number of shares shall not at any time be increased beyond said twenty thousand (20,000) shares except pursuant to a vote of the shareholders as hereinafter provided.

FORM OF CERTIFICATE. 4. The certificates of shares to be issued by the Trustees shall be substantially in the following form:—

"Certificate No. Shares.

COPLEY SQUARE TRUST

“This is to certify that is the owner of of the equal shares of One Hundred Dollars each of the Copley Square Trust, under the Declaration of Trust by Moses Williams, J. Morris Meredith, and John P. Reynolds, Junior, dated April ... , 1902 and recorded with Suffolk Deeds, Book, Page By acceptance of this certificate the holder accepts and becomes bound by the terms of said Declaration of Trust.

"Said shares are transferable only by assignment duly recorded on the books of the Trustees, upon surrender of this certificate properly endorsed.

“Witness the signatures of the Trustees of said trust this
..... day of 19...

"TRUSTEES OF THE COPLEY SQUARE TRUST."

COPLEY SQUARE TRUST

TRANSFER OF CERTIFICATES. 5. The share certificates and the scrip hereinafter provided for issued by the Trustees shall be the muniments and evidence of the interest of the shareholders hereunder. They shall be transferable only on the books of the Trustees upon their surrender duly endorsed or with the consent of the Trustees in some other way given, and the acceptance of a certificate for shares or scrip shall make the person therein named as shareholder or scrip-holder bound by this instrument.

NEW SHARES. 6. The shareholders may by vote at a meeting duly called for the purpose increase from time to time the number of shares to be issued hereunder by the Trustees. The holders of such new shares shall be interested hereunder equally with the holders of the shares first issued. Such new shares shall not be issued for less than one hundred dollars actually paid in cash, or its equivalent in the judgment of the Trustees. In the issue of any such new shares the right to subscribe shall (unless the Trustees shall determine upon some other method as being more advantageous for the trust) be offered *pro rata* to the then shareholders.

ISSUE OF SHARES AND SCRIP. 7. The Trustees shall issue the first twenty thousand shares, and all new shares authorized by the shareholders, from time to time as payment is made for them under the terms of such subscription contracts as shall to the Trustees seem proper for ensuring the prompt payment of the subscriptions. The Trustees shall issue scrip upon payment of the first subscription instalments in such form and upon such terms as they deem proper and thereafter upon payment of each succeeding subscription instalment new scrip in place of that previously issued.

UNDERWRITING OF SUBSCRIPTIONS, PROMOTION, ETC., EXPENSES. 8. The Trustees are empowered to procure underwriting subscriptions for said twenty thousand shares, and at the time of paying to the Museum of Fine Arts the first instalment of the purchase money under said contracts with it for the purchase of said property, the Trustees shall pay to each subscriber to the underwriting subscription agreement for said twenty thousand shares two per cent. on the amount of his subscription as an underwriting commission, and shall also pay to Meredith & Grew of Boston — to be

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apportioned by them among themselves and others as already agreed upon — \$30,000, as the entire compensation for forming this Trust and raising the capital.

PAYMENTS TO MUSEUM. 9. Out of the monies which come to them under this instrument the Trustees shall pay the purchase price instalments required under said contracts with said Museum of Fine Arts.

POWERS OF TRUSTEES. 10. The Trustees shall have power to pay for the services of counsel in the organization of this trust, the preparation of this instrument, the examination of the title to the real estate above described, and the general management of the trust; to pay the necessary expenses of the management of the trust, including compensations to such clerks, agents, and brokers as they deem necessary, including, if in their judgment it be necessary or wise, the payment of brokers' commissions for the marketing of any of the shares or scrip held by the underwriters or by said Museum of Fine Arts, and such architects, engineers, and other persons as they may think best for furnishing advice or plans for the development of the property above described; to invest any monies in their hands in such securities as are at the time permitted as investments to trustees under the laws of Massachusetts and said securities to sell or pledge at any time on such terms and for such considerations as seem to them proper. They shall have full power to make any agreements and any expenditures they may think advisable in connection with the straightening or altering of the boundary lines of said property and the removal of restrictions on the premises. The Trustees shall have full power — in addition to the powers enumerated above — to proceed in their discretion and at any time or times with the development of the property in the manner which may be, in their opinion, best calculated to advance the interests of the shareholders, and to that end the Trustees shall have power to sell, mortgage, and lease the property in whole or in part on such terms as to them shall seem proper, including the right to mortgage the property to secure part of the purchase money as provided in their contract with the Museum of Fine Arts, and no purchaser from them shall be bound to see to the application of the purchase money; to borrow money, giving therefor their notes as Trustees with or without collateral; to contract as Trustees for the

COPLEY SQUARE TRUST

erection upon the premises of such buildings as seem to them proper; to acquire for the benefit of the trust and on such terms as seem to them proper the shares or other securities in any corporations or associations which may be organized for the purpose of developing any part of the property; to make from time to time distributions on account of capital, and at any time in their discretion to liquidate and wind up the trust and distribute the net proceeds among the shareholders of record. It is, however, expressly stipulated that before engaging in any plan which will, in their judgment, require additional capital, the Trustees shall at a meeting of the shareholders as herein provided obtain authority to issue the further shares necessary to raise such additional capital.

COMPENSATION OF TRUSTEES. 11. Until said completion of the purchase of said property, the Trustees shall receive as compensation for their services fifteen hundred (1500) dollars per annum for each Trustee, in addition to the usual five per cent. commission (to be divided among the three) on the income of the monies invested by them (including as income all interest paid by the Museum of Fine Arts on the instalment payments of the purchase price under said contracts with it), and thereafter the compensation of each Trustee shall be fifteen hundred dollars per annum, or one-third of five per cent. on the trust income, whichever is the larger. Should the Trustees erect any buildings on the land of said trust, they are to receive two per cent., to be divided among them, on the total cost of any such buildings for their services in supervising the designing of the plans for the same and the construction.

DIVIDENDS. 12. Until the purchase of said property from the Museum of Fine Arts under said contract appended hereto has been completed by the delivery of deed and possession as in said contract provided, the Trustees shall pay dividends or interest on the shares and scrip from time to time outstanding at the rate of four per cent. per annum, on the amounts from time to time paid up thereon, payable semi-annually, July 1st and January 1st; and all such payments and also all other payments made prior to the completion of said purchase in excess of the income actually received shall be considered a part of the cost of said property.

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After said purchase has been completed, the Trustees shall from time to time declare and pay such dividends out of income as seem to them proper; and the Trustees shall have full power to determine what is income and what is principal.

LIMITATIONS ON TRUSTEES' POWERS. 13. The Trustees shall have no power to bind the shareholders personally, and in every written contract into which they shall enter reference shall be made to this Declaration of Trust; and the party contracting with the Trustees shall look only to the funds and property of the trust for the payment of any liability and obligation under the contract, and neither the Trustees nor the shareholders, present or future, under this instrument, shall be personally liable therefor.

RESERVE FUND. 14. The Trustees may establish a reserve fund for future contingencies, and for that purpose may set aside and invest annually such sum as to them seems proper out of the income; and such reserve fund they may in their discretion distribute in whole or part as income at any later time.

TRUSTEES' ACCOUNTS. 15. The Trustees shall keep or cause to be kept proper books which shall at all reasonable times be open to inspection by any shareholder. They shall each year make a financial report to the shareholders.

RESIGNATION, REMOVAL, AND APPOINTMENT OF TRUSTEES. 16. Any Trustee may by written instrument signed, acknowledged, and recorded in the Suffolk County Registry of Deeds, resign his office.

Any vacancy in the number of Trustees may be filled by the remaining Trustees by a written instrument signed, acknowledged, and recorded as aforesaid, and such appointment shall be final unless and until revoked by the vote of the shareholders. A Trustee so appointed shall have all the powers and duties of his predecessor. The acting Trustees for the time being, whether surviving or remaining, shall have all the powers and discretions of the original Trustees. Upon resignation, decease, incapacity, removal, or vacancy for any cause, the title of the outgoing Trustee shall vest in the remaining Trustees, and upon the filling of any vacancy the title to the whole trust property shall vest jointly in those who shall then be Trustees hereunder.

COPLEY SQUARE TRUST

The Trustees shall be responsible only for wilful breach of trust; and no Trustee shall be liable for allowing one or more of their number to have possession of the trust books or to make collections, or to have the sole custody of the trust monies, and no Trustee shall be responsible except for his own acts. No bond or surety or sureties shall ever be required of any trustee acting hereunder.

When any Trustee is absent from said Commonwealth or unable to perform his duties or has died, the remaining Trustees or Trustee shall have the power to act; and the certificates of the remaining Trustees or Trustee as to such absence, disability, or death shall be conclusive upon all parties in interest.

NATURE OF SHAREHOLDERS' INTEREST. 17. No title or estate in any property at any time held by the Trustees hereunder is to vest in the shareholders, but the same shall be and remain in said Trustees, their successors and assigns. The sole interest of each shareholder shall be in the obligation of the Trustees to hold, manage, and dispose of said property and to account for its income and proceeds as in this instrument provided.

DEATH OF SHAREHOLDER. 18. The death of any shareholder shall not terminate the trust nor entitle his legal representatives to claim an account, except as hereinbefore provided, or to take any action in court for a partition or winding up or otherwise against the Trustees; but the executors, administrators, or assigns of the decedent shall succeed to all the rights of the decedent under this instrument upon producing his certificate.

MEETINGS OF SHAREHOLDERS. 19. The Trustees may, whenever they see fit, call meetings of the shareholders; and they shall do so upon the written request of the holder or holders of at least one-tenth of the shares outstanding. Notices of meetings shall be given by the Trustees at least five days in advance by mailing postage prepaid a copy to each shareholder to the last address furnished by him to the Trustees, or in default thereof to his last known residence or place of business. Shareholders may attend and vote in person or by proxy, and each share shall be entitled to one vote. A majority in amount of the shareholders shall constitute a quorum. Until all subscription instalments have been called

APPENDIX OF FORMS

for payment the holders of scrip from time to time outstanding who are not in default as to any instalment shall have all the rights of shareholders under this instrument. And the words shareholder and shareholders shall include such scrip-holders, wherever used in this instrument, unless the context makes such meaning impossible.

INSTRUCTIONS AND AMENDMENTS BY SHAREHOLDERS.

20. By a vote of a majority in value of the shares outstanding, the shareholders may from time to time authorize or instruct the Trustees in any manner, may remove any Trustee and appoint another in his place with the same effect as provided in Article 16 and may alter or amend this Declaration of Trust, but not so as to subject the Trustees or shareholders to any personal liability or to affect the previously acquired rights hereunder of any person other than the Trustees or shareholders. No such action, and no removal or appointment of Trustees, shall affect any person other than the Trustees or shareholders, not having actual notice thereof, until recorded in the Suffolk County Registry of Deeds.

RECORDING NEW MATTER. 21. Any paper signed by the Trustees and a copy of the record of any of the proceedings of the shareholders, certified by the Trustees, which it may be deemed desirable to record in the Registry of Deeds, may be acknowledged by any one of the Trustees, in the manner prescribed for the acknowledgment of deeds; and such paper or copy duly recorded shall be conclusive evidence of the facts therein stated and of the regularity of the meeting.

WINDING UP BY VOTE. 22. Whenever three-fourths in value of the shareholders shall in writing or by vote so direct, the Trustees shall liquidate and wind up the trust and distribute the proceeds among the shareholders or shall convey the trust property as by such writing or vote directed, and thereupon the Trustees shall be under no further liability.

WINDING UP BY LIMITATIONS. 23. This trust shall, unless sooner terminated as above provided, continue for twenty years after the death of the last survivor of the following persons:—

Moses Williams, Junior, Hugh Williams, Mary E. Williams, Constance M. Williams, and Gladys Williams, children of said Moses Williams; Frederick C. Bowditch, Junior,

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Edward F. Bowditch, and Elizabeth H. Bowditch, children of Frederick C. Bowditch, of said Brookline; Priscilla M. Reynolds and John P. Reynolds, 3d, children of said John P. Reynolds, Junior; Thomas Gorham, son of Robert S. Gorham, of Newton, in the County of Middlesex and said Commonwealth; and Elliott Perkins, son of Thomas Nelson Perkins, of Westwood, in said County of Norfolk.

IN WITNESS WHEREOF we, the said Trustees, have hereunto set out hands and common seal on the day and year first above written.

COMMONWEALTH OF MASSACHUSETTS }
SUFFOLK } ss.

A.D. 1902.

Then personally appeared the above named Moses Williams, J. Morris Meredith, and John P. Reynolds, Junior, and acknowledged the foregoing instrument to be their free act and deed as trustees as aforesaid.

Before me

.....
Justice of the Peace.

C

PARK SQUARE REAL ESTATE TRUST

(Williams v. Johnson, 208 Mass. 544; Williams v. Boston, 208 Mass. 497; Williams v. Milton, 215 Mass. 1)

THIS DECLARATION OF TRUST, made this fifteenth day of September in the year one thousand nine hundred and nine.

WITNESSETH

Whereas the NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a corporation duly organized under the laws of the Commonwealth of Massachusetts, has conveyed to Moses Williams of Brookline, Amory A. Lawrence, Alfred Bowditch and Laurence Minot of Boston, all of the Commonwealth of Massachusetts, by deed of even date and to be recorded herewith, certain real estate in the City of Boston, particularly described in said deed, reference to which is hereby made, to be held by them upon the trusts hereinafter set forth,

NOW, THEREFORE, we, the said MOSES WILLIAMS, AMORY A. LAWRENCE, ALFRED BOWDITCH AND LAURENCE MINOT, do hereby declare said trusts as follows:

1. The trustees shall forthwith issue certificates in substantially the form hereinafter set forth for fifty-two thousand shares of the nominal par value of one hundred dollars each, to the said NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, in payment for the real estate this day conveyed to them. The entire interest of the *cestuis que trustent*, or shareholders, in the property held or to be held by the trustees is represented at this date by said fifty-two thousand shares to be issued as above provided. The trustees may issue certificates in substantially the form hereinafter set forth for not exceeding forty thousand additional shares of the nominal par value of one hundred dollars each, in exchange for convertible notes or bonds, as hereinafter provided.

Form of Certificate

.....Shares.

under a Declaration of Trust dated September 15, 1909,
and recorded in Suffolk County Registry of Deeds, libro
.....page....

The shares represented by this certificate may be transferred on the books of the said trustees in accordance with the provisions of said Declaration of Trust.

..... } Trustees.

3. The death of a shareholder during the continuance of this trust shall not operate to determine the trust, nor shall it entitle the legal representatives of a deceased shareholder to an account, to take any action in the courts, or otherwise, against the trust or the trustees; but the execu-

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tors, administrators or assigns of the deceased shall succeed to all rights of said deceased under this trust upon the surrender of the certificate of such shares.

4. The trustees may, from time to time, at their discretion, invite and receive subscriptions to additional shares at the price of not less than one hundred dollars each for the purpose of increasing the capital of the trust, giving preference, upon such terms and conditions as they shall deem best, to existing shareholders and to the holders of convertible notes or bonds. All subscriptions shall be subject to the terms of this Declaration of Trust.

5. The trustees shall issue certificates in substantially the form hereinbefore set forth for each sum of one hundred dollars, or for multiples thereof, paid to them for the purchase of additional shares; but no certificate except those to be forthwith issued hereunder in payment for the real estate this day conveyed to the trustees and except those issued and used for exchange for convertible notes or bonds as herein elsewhere provided, shall be issued for any less sum than one hundred dollars; and no certificate shall be issued hereunder until a record thereof has been made in the books of the trustees.

6. Shares may be transferred on the books of said trustees by the person named in the certificate thereof, his attorney or legal representative, upon the surrender of the certificate, and a new certificate shall be issued to the transferee, who shall thereupon become subject to the terms of this Declaration of Trust.

All transfers of shares shall be recorded in the books of the trustees.

The words "shareholder" and "shareholders," wherever used herein, shall be construed to mean those who are for the time being recorded as such on the books of the trustees, and only to such shall the trustees be responsible.

7. No assessment shall ever be made upon the shareholders.

8. The books of said trustees shall always be open to the inspection of shareholders.

9. The trustees shall have no power to bind the shareholders personally and all persons or corporations extending credit to, contracting with or having any claim against the trustees, shall look only to the funds and property of the

PARK SQUARE REAL ESTATE TRUST

trust for payment under such contract or claim, or for the payment of any debt, damage, judgment or decree, or of any money that may otherwise become due or payable to them from the trustees, so that neither the trustees nor the shareholders, present or future, shall be personally liable therefor. In every written order, contract or obligation which the trustees shall give or enter into, it shall be the duty of the trustees to refer to this declaration and to stipulate that neither the trustees nor the shareholders shall be held to any personal liability under or by reason of such order, contract or obligation.

10. The trustees shall have the absolute control over and disposal of all real estate and other property held by them at any time under this trust, including the power to improve the real estate at any time held by them by building thereon or otherwise, to sell for cash or credit at public or private sale, and to take back mortgages to secure the whole or any part of the purchase price of any real estate sold by them, and to assign and discharge such mortgages, to mortgage with or without power of sale, to lease or hire for improvement or otherwise for a term beyond the possible termination of this trust, or for any less term, to let, to exchange, to release and to partition.

They may represent the shareholders and the trust in all suits or legal proceedings relating to the trust estate in any courts of law or equity, or before other bodies or tribunals, may employ counsel and commence suits or proceedings, or compromise, or submit to arbitration, all matters of dispute to which the trust or the trustees may be a party, when in their judgment considered necessary or proper.

11. The trustees shall have power to borrow money from time to time to carry out the purposes of this trust, and the decision of the trustees as to what constitute such purposes shall be final, and to issue their promissory notes or bonds, as trustees hereunder, for money so borrowed, and to secure the repayment of any money borrowed by a pledge, mortgage or hypothecation of the trust property or of any part thereof, provided, however, that no trustee nor any shareholder hereunder shall be personally liable for any money so borrowed, and that in every promissory note, bond and other obligation issued by the trustees hereunder, they shall refer to this declaration and stipulate against personal lia-

APPENDIX OF FORMS

bility, both of the trustees and of the shareholders, as hereinbefore in paragraph 9 hereof set forth. The total indebtedness of the trustees for money borrowed shall not at any one time exceed the principal sum of four million dollars (\$4,000,000). No lender of money to the trustees shall be bound to inquire as to the indebtedness of the trustees to any other person or persons, nor shall any such lender or purchaser be liable for the application of money loaned or of purchase money.

12. The trustees may from time to time issue their notes or bonds to an amount not exceeding four million dollars, bearing interest at a rate not exceeding four per centum per annum, secured by mortgage of the whole or any part of the trust property, and convertible into shares of this trust on any interest day prior to the second day of July, in the year one thousand nine hundred and nineteen, on the basis of ten shares of the nominal par value of one hundred dollars each for each one thousand dollars par value of such notes or bonds, *ex coupon* due on day of conversion, and they may secure by the same mortgage one or more series of convertible notes or bonds and one or more series of non-convertible notes or bonds. The face value of any notes or bonds issued under this section of this instrument shall be reckoned as a part of the total sum which the trustees have hereinbefore been authorized to borrow.

13. The trustees may acquire by purchase or otherwise any real estate, or any interest therein, in the general vicinity of that this day conveyed to them (and the judgment of the trustees as to what constitutes general vicinity shall be final), and any notes, bonds, shares or other securities of any corporation, association or real estate trust, organized or adapted for the purpose of acquiring, holding, managing or improving real estate, or for the purpose of conducting a lighting, heating, power or other business directly related to the management of real estate, if in their judgment such acquisition will in any manner tend to facilitate the laying out, developing, management or improvement of the real estate this day conveyed to them. The trustees may lay out and construct or discontinue any streets or ways upon any property at any time held by them. The trustees may dedicate to any public use, or convey to the city of Boston, with or without compensation therefor,

PARK SQUARE REAL ESTATE TRUST

such part or parts of any property at any time held by them as, in their judgment, will enhance the value of their remaining property (any property which may have been sold with an agreement for such dedication or conveyance being deemed a part of such remaining property for this purpose) to a degree equal to or greater than the value of the part or parts thereof so dedicated or conveyed (and the judgment of the trustees as to the extent of such enhancement shall be final and shall be conclusively evidenced by any act of dedication to any public use or any deed of conveyance to said city of Boston). The trustees may contribute money or other property to the cost of any public or *quasi* public undertaking, which in their judgment will be advantageous to the trust property. The powers given the trustees in this section of this instrument shall be construed as given in addition to any powers given them elsewhere, and the judgment of the trustees, if exercised in good faith, shall be final.

14. Any real estate, or any interest therein, acquired by the trustees after the delivery of this instrument, may be conveyed to them in joint tenancy as trustees hereunder, or may be conveyed to any one or more of them as individuals, or to any other person or persons for their benefit, but on or before the first day of April in the year one thousand nine hundred and twelve the trustees shall cause to be conveyed to them in joint tenancy as trustees hereunder all real estate then owned by them, and all real estate thereafter acquired shall be conveyed to them in joint tenancy as trustees hereunder.

15. Any notice to any subscriber hereto or to any shareholder of any meeting, assessment, dividend, or of any other matter or thing which may be required under the provisions of this instrument, or which may be deemed by the trustees necessary or desirable, or which may be ordered in any judicial proceedings, shall be deemed sufficient and binding if a written or printed copy of such notice shall be delivered personally, or mailed, with prepayment of postage, to such subscriber or shareholder, or to his attorney designated for the purpose, at the residence given on his subscription or stated in his certificate, or to the address given by him from time to time to said trustees, ten days prior to the date fixed for such meeting, for the payment of such assessment, or

APPENDIX OF FORMS

dividend, or for the happening of any other matter, thing or event, of which such notice is given.

16. The trustees may from time to time in their discretion determine which of their receipts and expenditures shall be treated as capital and which as income, and in making such determination they shall be guided by their judgment as business men, having regard to the character and development of the trust property, rather than by any strict rule of law, and their determination shall be final. They may divide the whole or any part of the net income of the property held by them under this trust among the shareholders annually or oftener in their discretion, and in any fiscal year in which the net income of the trust property exceeds two per centum of the par value of the average number of shares outstanding during such fiscal year they shall divide at least three-fourths of the net income. The decision of the trustees as to what constitutes net income shall be final. The trustees may set aside for a reserve or contingent fund or use for the improvement of the trust property any net income not divided as above provided.

17. Any reserve or contingent fund and any money awaiting investment, or temporarily not required for the purposes of the trust, may be put at interest or invested and reinvested in income-yielding securities by the trustees at their discretion.

18. The trustees may from time to time hire suitable offices for the transaction of the business of the trust, appoint such officers and agents as they may think best, fix their compensation and define their duties.

The compensation of the trustees with respect to income shall not at any time exceed five per centum of the income of the property held by them.

The compensation of the trustees with respect to capital shall not at any time exceed three per centum of any sums expended by them for the development and improvement, by the erection of buildings or otherwise, of the trust property, and of the value of any property sold by them.

19. Any trustee under this instrument may resign his trust by a written instrument signed by him and acknowledged in the manner required for the acknowledgment of deeds; and such instrument shall be recorded in the Registry of Deeds for the County of Suffolk and Commonwealth of

PARK SQUARE REAL ESTATE TRUST

Massachusetts. When any vacancy occurs at any time in the office of trustee all property in the trust shall vest in the remaining trustees or trustee, and such vacancy shall be filled by the remaining trustees or trustee by an instrument in writing acknowledged and recorded as aforesaid, and the title to all the property of the trust shall vest in any new trustee and the other trustees, and such new trustee shall have the same powers as if originally named herein.

The trustees may, from time to time, by a written instrument signed by them and acknowledged in the manner required for the acknowledgment of deeds and recorded in the Registry of Deeds for Suffolk County, authorize any two of their number to exercise any or all of the powers hereunder, and such authority may be so given to any two trustees hereunder by name, or to any two of the persons who may at any time be lawfully acting as trustees hereunder, without naming them. When any trustee is absent from the Commonwealth of Massachusetts, or incapable by reason of illness or otherwise, the other trustees shall have all the powers hereunder; and any trustee may by power of attorney delegate his powers, for a period not exceeding six months at any one time, to any other trustee or trustees hereunder, provided that in no case shall less than two trustees actually exercise the powers hereunder except as aforesaid. The term "the trustees" wherever used herein shall be deemed to mean those who are or may be trustees for the time being. No trustee shall be required to give a bond.

20. No trustee hereunder shall be responsible except for his own wilful default. The trustees shall not be responsible for the act, omission or default of any agent, if they have used reasonable care in the selection of such agent. The trustees may pay out of the trust fund all sums of money to the payment of which they or either of them, by reason of being trustees hereunder, may be held liable or subjected by way of damages, penalty or fine.

21. At and upon the expiration of twenty years after the death of the last survivor of the following-named persons, Moses Williams, Amory A. Lawrence, Alfred Bowditch, Laurence Minot, being the original trustees hereunder, Moses Williams, 3d, and Alexander Whiteside Williams, sons of Moses Williams, Jr., of Needham, William Minot

APPENDIX OF FORMS

and Sedgwick Minot, sons of William Minot, late of Boston, deceased, and John S. Lawrence, son of said Amory A. Lawrence, or at such earlier time, not earlier than the second day of July in the year one thousand nine hundred and nineteen, as three-fourths in value of the shareholders may, by an instrument in writing, signed and acknowledged in the manner prescribed for the acknowledgment of deeds, and recorded in the office of the Registry of Deeds for said Suffolk County, appoint, said trustees shall terminate this trust by selling, as soon as feasible in their judgment, all property then held by them as such, and dividing the proceeds among the shareholders.

PROVIDED, HOWEVER, that upon the request of three-fourths in value of the shareholders in writing, signed, acknowledged and recorded as above provided, and made not earlier than the second day of July in the year one thousand nine hundred and nineteen, said trustees may, if it seems to them judicious so to do, convey the trust property to new or other trustees, or to a corporation, according to the terms of such request, and in the manner stated therein, being first duly indemnified for any outstanding obligation; and said trustees, upon filing in the Registry of Deeds for said Suffolk County a certificate that they have complied with such request, shall be under no further obligation.

PROVIDED, HOWEVER, and it is especially understood and agreed that nothing in this clause contained shall be construed as making it obligatory upon the trustees to comply with such request to convey.

22. Meetings of the shareholders may be called by any one of the trustees and shall be called upon the written request of five or more shareholders. Additional powers may be created in the trustees at any meeting of the shareholders by vote or resolution of the holders of at least two-thirds of the shares then outstanding; provided that notice of the proposed addition to such powers shall have been given in the call for the meeting and that the same is not inconsistent with the acquired rights of third parties. All recitals of fact in any instrument in writing, signed and sealed by the trustees and acknowledged by one or more of them, and recorded in the Registry of Deeds for the County of Suffolk, shall be conclusive evidence of all facts so recited in favor of all persons dealing with the trustees.

PARK SQUARE REAL ESTATE TRUST

23. At all meetings of shareholders each share shall be entitled to one vote, and absent shareholders may vote by proxy authorized by a writing dated and executed within six months previous to the meeting at which it is used.

24. The trustees or any of them, in their individual capacity, or in any other fiduciary capacity, acting alone or in conjunction with others, may purchase and hold any shares issued hereunder and also may subscribe for and purchase on the terms offered to third persons generally, any notes or bonds convertible or otherwise authorized or issued by the trustees, and may purchase at public auction any real estate or any interest therein offered for sale by the trustees, and may purchase at private sale on any terms approved by the vote of three-fourths in value of the registered shareholders passed at any meeting called for that purpose, such terms being stated in the call for such meeting, any real estate or any interest therein offered for sale by the trustees.

IN WITNESS WHEREOF we have hereunto set our hands and seals this fifteenth day of September in the year one thousand nine hundred and nine.

MOSES WILLIAMS	(Seal)
AMORY A. LAWRENCE	(Seal)
ALFRED BOWDITCH	(Seal)
LAURENCE MINOT	(Seal)

COMMONWEALTH OF MASSACHUSETTS }
COUNTY OF SUFFOLK } ss. BOSTON, October 21, 1909.

Then personally appeared the above-named Laurence Minot, and acknowledged the foregoing instrument to be his free act and deed, Before me,

CHARLES S. RACKEMANN,
Justice of the Peace.

BOSTON, December 24, 1909.

at 3 o'clock and 39 minutes P.M.

Received and Entered with Suffolk

Deeds, Libro 3418, Page 504.

Attest:

WILLIAM T. A. FITZGERALD,
Registrar.

D

BOSTON PERSONAL PROPERTY TRUST

(Williams v. Milton, 215 Mass. 1)

THIS DECLARATION OF TRUST, made this tenth day of January, in the year eighteen hundred and ninety-three, by John Quincy Adams of Quincy, Moses Williams of Brookline, William Minot, Jr., and Abbott Lawrence Lowell, both of Boston, and Robert Sedgwick Minot of Manchester, all in the Commonwealth of Massachusetts (hereinafter called the Trustees), witnesseth:

DESIGNATION

First. That this trust shall be designated the "BOSTON PERSONAL PROPERTY TRUST."

I. TRUSTEES' DUTIES, POWERS AND LIABILITIES

DECLARATION, NOT A PARTNERSHIP, CESTUIS NOT LIABLE

Second. That the said Trustee shall hold all the funds and property (hereinafter called the trust fund), now or hereafter held by or paid to, or transferred or conveyed to them or their successors as Trustees hereunder in trust for the purposes, with the powers and subject to the limitations hereinafter declared, for the benefit of the *cestuis que trustent*, and it is hereby expressly declared that a trust, and not a partnership, is hereby created; that neither the trustees nor the *cestuis que trustent* shall ever be personally liable hereunder as partners or otherwise, but that for all debts the trustees shall be liable as such to the extent of the trust fund only. In all contracts or instruments creating liability, it shall be expressly stipulated that the *cestuis que trustent* shall not be liable.

BOSTON PERSONAL PROPERTY TRUST

PAYMENTS

Third. In case any person proposes to pay by instalments, or at a future date, sums of money for interests in the trust fund, the trustees shall have full power and discretion to call such payments upon such terms and conditions as they see fit, and to receive the same either wholly or partly in cash, or in any property in which they are authorized to invest said fund.

POWER OF INVESTMENT, PERSONAL PROPERTY, GROUND RENTS

Fourth. (a) The Trustees shall have as full power and discretion, as if absolute owners, to invest and reinvest the trust fund (including any surplus and also income) in personal property, including bonds and notes or obligations secured upon real estate, and the decision of the Trustees as to what is personal property shall be final. They shall have the like power of investment in the purchase and improvement of real estate in the cities of the United States of America, for the purpose of leasing the same upon long terms, or ground rents so-called; and all real estate so purchased shall be conveyed to them in joint tenancy as Trustees hereunder.

POWER OF SALE

(b) The Trustees shall have full power and discretion to sell, transfer, and convey from time to time, at public or private sale, any part or all of said trust fund, upon such terms and conditions as they see fit, and to invest the proceeds in the same manner, and upon the same trusts as the original fund.

POWERS AS TO REAL ESTATE

(c) The Trustees shall have absolute control over and power to dispose of all real estate held by them at any time under this Trust, as if they were the absolute owners thereof, including the power to sell and convey, as above set forth, to improve, to lease or hire for improvement or otherwise, for a term beyond the possible termination of this trust, or for any less term, either with or without option of purchase, to let, to exchange, to release, and to partition.

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POWER TO BORROW AND MORTGAGE

(d) The Trustees may borrow money, for such time and upon such terms as they see fit, on mortgage of any real estate held by them hereunder, and may give mortgages therefor, either with or without power of sale, but never for more than sixty per cent. of the value, in their judgment, of the property so mortgaged.

POWER TO BORROW AND PLEDGE

(e) The Trustees shall also have power at any time to borrow money, and to pledge, as collateral security for such loan, any personal property belonging to the trust fund, provided, however, that no loan shall be contracted for, so that the aggregate amount of such loans outstanding shall at such time exceed, in the judgment of the Trustees, twenty-five per cent. of the total amount of the personal property of the trust fund.

EXECUTION OF INSTRUMENTS

(f) The execution of all contracts, of all conveyances and transfers, and of all other instruments relating to the trust fund or any part thereof, by any three Trustees, shall always be sufficient. The acting Trustee or Actuary or Treasurer shall have full power to cancel and discharge mortgages, by deed or otherwise, on the payment or satisfaction thereof.

PURCHASERS, ETC., NOT LIABLE

(g) No purchaser, lender, corporation, association or officer or transfer agent thereof, dealing with the Trustees, shall be bound to make any inquiry concerning the validity of any sale, pledge, mortgage, loan, or purchase purporting to be made by the Trustees, or be liable for the application of money paid or loaned.

RECORDS, DEPOSITARY

Fifth. The Trustees shall constitute as their Depositary such trust company in the city of Boston as they shall from time to time select, and hereby declare that they have selected for such Depositary the State Street Safe Deposit & Trust Company. Such Depositary shall have the cus-

BOSTON PERSONAL PROPERTY TRUST

tody of this declaration of trust, of any and all instruments altering or adding to the same, or terminating the trust, or containing the resignation of one or more Trustees, or appointing one or more Trustees to fill vacancies, or appointing a Trustee attorney for a co-Trustee, or otherwise affecting this declaration of trust, or the duties, powers, or liabilities of the Trustees. Such Depositary shall be bound to deliver on demand to any new Depositary selected by the Trustees, all such documents and records, and also to record, at the request of the Trustees, any such document in any place of public record selected by them, whereupon the duty of such Depositary as to such recorded document, and its liability therefor hereunder, shall cease, and it shall deliver to the Trustees all papers relating to the same. Copies of all documents and records in the custody of such Depositary, duly certified, and certificates as to who are the Trustees, or *cestuis que trustent*, or the like, duly signed by the President, Treasurer, or Actuary of such Depositary, shall be conclusive upon all questions as to title or affecting the rights of third persons, and in general shall have all the effect of their originals.

MANAGEMENT AND COMPENSATION

Sixth. The Trustees may from time to time hire suitable offices for the transaction of the business of the Trust, appoint, remove, or reappoint such officers or agents (including a Depositary, and also agents to procure proposals for payments for interests herein) as they may think best, define their duties, and fix their compensation. The compensation of the Trustees shall not at any time exceed five per cent. of the gross income of the Trust Fund, and one per cent. of the amount distributed or conveyed upon final distribution or conveyance.

DIVIDENDS, SURPLUS

Seventh. The Trustees shall declare dividends from the net income of the Trust Fund among the *cestuis que trustent* quarterly, or oftener, if convenient to the Trustees, and their decision as to amount of dividends, and as to using therefor any portion of the surplus fund, shall be final. They may set aside from time to time such portion of the net income as shall not be required for dividends for a surplus fund.

APPENDIX OF FORMS

POWER TO DECIDE BETWEEN INCOME AND CAPITAL

Eighth. The Trustees may charge all brokers' and agents' commissions to Income or Capital, as they see fit. They shall have the right to treat as income such portion of the price of stock bought or sold between dividend days as fairly represents accrued dividends reckoned by way of interest, but never at a higher rate than six per cent. per annum on the price paid or received. In general their decision as to what constitutes Capital or Income, or shall be credited or debited to Capital or Income, shall be final.

ANNUAL ACCOUNT

Ninth. The Trustees shall render an account annually or oftener, if convenient to them, and shall, upon request, deliver or mail a copy to each *cestui que trust*.

RESIGNATION, VACANCY, NEW APPOINTMENT, TEMPORARY ABSENCE, POWER OF ATTORNEY

Tenth. Any Trustee may resign his trust by a written instrument signed and sealed by him, and acknowledged in the manner prescribed for the acknowledgment of deeds, and such instrument may be recorded in the Registry of Deeds for the County of Suffolk, or deposited with such Depositary as the Trustees shall from time to time select.

Any vacancy occurring from any cause at any time in the number of said Trustees shall be filled by the remaining Trustees. Until such vacancy is filled, or while any Trustee is absent from the Commonwealth of Massachusetts, or physically or mentally incapable, by reason of disease or otherwise, the other Trustees shall have all the powers hereunder, and the certificate of the other Trustees of such vacancy, absence, or incapacity shall be conclusive. In case of such vacancy or of appointment of a new Trustee or Trustees, the Trust Fund shall immediately vest in the remaining Trustees or in the new Trustee or Trustees, jointly with the remaining Trustees, as the case may be. And any Trustee may, by power of attorney, delegate his powers, for a period not exceeding six months at any one time, to any other Trustee or Trustees hereunder, provided that in no case shall less than three Trustees personally exercise

BOSTON PERSONAL PROPERTY TRUST

the other powers hereunder (except in case of discharge of mortgages, as hereinbefore provided).

The term "Trustees" used in this agreement shall be deemed to mean those who are or may be Trustees for the time being.

TRUSTEES' LIABILITY, NO BOND REQUIRED

Eleventh. Each Trustee shall be responsible only for his own wilful and corrupt breach of trust, and not for any honest error of judgment, and not one for another. No Trustee shall be required to give a bond.

II. RIGHTS AND LIABILITIES OF CESTUIS QUE TRUSTENT, NOTICES

Twelfth. Notices delivered personally, or mailed with prepayment of postage seven days beforehand to any *cestui que trust*, or to his attorney duly designated for the purpose, at the residence stated by him or in the certificate, or to the address given by him or them from time to time to the Trustees, shall be binding.

FORFEITURE OF PAYMENTS

Thirteenth. In case any *cestui que trust* neglects to pay any instalment within the time specified in the call therefor, the Trustees may, if they see fit, declare any amount of his previous payment or payments to be forfeited.

CERTIFICATES, CONVERTIBLE SCRIP, LOST CERTIFICATES

Fourteenth. The Trustees shall issue a certificate, in such form as they shall deem best, to each person who shall pay them the sum of one thousand dollars or multiple thereof, for an interest in the Trust Fund. But no certificate shall be issued for any less sum than one thousand dollars, at par value. The Trustees may also from time to time, if they see fit, issue scrip of the par value of one hundred dollars or multiples thereof, convertible into certificates in sums of one thousand dollars or multiples thereof, and bearing interest, and on such other terms and conditions as they shall deem best.

In case of the loss or destruction of a certificate or scrip, the Trustees may issue a duplicate thereof, on such terms as they deem proper.

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TRANSFER OF CERTIFICATES

Fifteenth. The interests represented by the certificates may be transferred on the books of the Trustees by the person named therein, or his legal representative, upon the surrender of the certificate, and a new certificate shall be issued to the transferee, who shall thereupon become a *cestui que trust*. But no such interest shall be sold until the holder thereof (including assignees in insolvency or bankruptcy, or for benefit of creditors, and holders by process of law or otherwise, except as hereinafter stated) shall have first in writing offered it for sale to the Trustees, who shall, as such Trustees, have the option for ten days after the receipt of such offer of buying the same at not more than the last preceding appraisal made by them, such appraisal to be made annually or oftener as they shall deem best. Interests so purchased by the Trustees may be held as part of the Trust Fund, or sold by them at their discretion.

Devises by will, distribution of the assets of deceased persons according to law, and distribution of trust funds among those entitled thereto upon the termination of trusts, shall not be deemed sales for the purposes hereof.

NO ASSESSMENT OR PERSONAL LIABILITY

Sixteenth. No assessment shall ever be made upon the *cestuis que trustent*, nor shall they ever be personally liable in any event, or have any rights hereunder except as herein defined.

BOOKS OPEN TO INSPECTION

Seventeenth. The books of the Trustees shall always be open to the inspection of the *cestuis que trustent*.

INCREASE OF CAPITAL, RIGHTS

Eighteenth. The Trustees may from time to time, at their discretion, invite and receive payments for interests in the Trust Fund in cash or in property, as hereinbefore provided, for the purpose of increasing the capital of the Trust Fund, giving preference, if they see fit, upon such terms and conditions as they shall deem best, to existing *cestuis que trustent*. All payments shall be subject to the terms of this Declaration of Trust.

BOSTON PERSONAL PROPERTY TRUST

III. DURATION AND TERMINATION OF TRUST

Nineteenth. At and upon the expiration of twenty years after the death of the last survivor of the following-named persons: —

Walter Abbott, son of Jere Abbott of Boston;
George C. Adams, son of John Quincy Adams of Quincy;
Oliver Ames, son of Frederick L. Ames of Easton;
F. Reginald Bangs, son of Edward Bangs of Wareham;
Boylston A. Beal, son of James H. Beal of Boston;
Robert P. Blake, son of S. Parkman Blake of Boston;
Causten Browne, Jr., son of Causten Browne of Boston;
Edmund D. Codman, son of Robert Codman of Boston;
David H. Coolidge, Jr., son of David H. Coolidge of Boston;
Philip Dexter, son of William S. Dexter of Boston;
John M. Howells, son of William D. Howells of Boston;
Laurence Minot, son of William Minot of Boston;
William Minot, 3d, son of William Minot, Jr., of Boston;
James Otis Porter, son of Alexander S. Porter of Beverly;
Abbott Lawrence Rotch, son of Benjamin S. Rotch, late of Milton;
James J. Storrow, Jr., son of James J. Storrow of Boston;
Samuel Wells, Jr., son of Samuel Wells of Boston;
George Putnam, son of William L. Putnam of Boston;
Gladys Williams, daughter of Moses Williams of Brookline;
Robert S. Minot, Jr., son of Robert S. Minot of Manchester;

or at such earlier time as hereinafter provided, the Trustees shall terminate this trust by dividing the Trust Fund, or the proceeds thereof, among the *cestuis que trustent*, being first duly indemnified for any outstanding obligation or liability, and shall thereupon be forthwith discharged.

ALTERATION OF TRUST, TERMINATION OF TRUST, CONVEYANCE OF TRUST FUND

Twentieth. The Trustees may, with the consent of the three-fourths in interest of the *cestuis que trustent*, alter or add to this declaration, or terminate this trust, and if it seems to them judicious so to do, they may, with like consent,

APPENDIX OF FORMS

convey the Trust Fund to new or other Trustees, or to a corporation, being first duly indemnified for any outstanding obligation or liability. The instrument setting forth such alteration, addition, termination, or conveyance shall be signed by at least three of the Trustees and recorded in said Registry of Deeds, or deposited with such Depositary as the Trustees shall select. Such instruments shall be conclusive of the existence of all facts and of compliance with all prerequisites necessary to the validity of such alteration, addition, termination, or conveyance, whether stated in such instrument or not, upon all questions as to title or affecting the rights of third persons.

PROVIDED, HOWEVER, and it is especially declared, that the Trustees shall be under no obligation to terminate this Trust or convey the Trust Fund, except as hereinbefore provided.

IN TESTIMONIUM

Twenty-first. IN WITNESS WHEREOF, the said Trustees have hereunto set their hands and seals the day and year above written in duplicate.

Signed and sealed in presence of

Signed CHARLES H. SHRIVER

Signed {	JOHN QUINCY ADAMS	(Seal)
	MOSES WILLIAMS	(Seal)
	WILLIAM MINOT, JUNIOR	(Seal)
	A. LAWRENCE LOWELL	(Seal)
	ROBERT S. MINOT	(Seal)

COMMONWEALTH OF MASSACHUSETTS }
SUFFOLK } ss. BOSTON, January 14, 1895.

Then personally appeared the above named John Quincy Adams, Moses Williams, William Minot, Junior, A. Lawrence Lowell, Robert S. Minot, and acknowledged the foregoing instrument to be their free act and deed.

Before me,

Signed CHARLES H. SHRIVER,
Notary Public.

A true copy of the original on file with this Company.

STATE STREET TRUST CO.,
A. L. CARR, *Treasurer.*

BOSTON PERSONAL PROPERTY TRUST

BOSTON PERSONAL PROPERTY TRUST

RESIGNATION OF CHARLES C. JACKSON AS TRUSTEE

BOSTON, Mass., March 31, 1906.

To Moses Williams, A. Lawrence Lowell, Robert S. Minot, and Charles F. Adams, 2d, my Co-Trustees under a declaration of trust dated January 10, 1893.

Dear Sirs, — I hereby resign my Trusteeship under said Declaration of Trust, said resignation to take effect at the close of business this day.

Very truly yours,

CHARLES C. JACKSON.

COMMONWEALTH OF MASSACHUSETTS }
SUFFOLK } ss.

March 31, 1906.

Then personally appeared the above-named Charles C. Jackson and acknowledged the foregoing instrument to be his free act and deed.

Before me,

EDMUND W. YOUNG,
Notary Public.

(Notarial Seal)

A true copy of the original instrument on file with this Company.

STATE STREET TRUST Co.,
By E. W. FOOTE, *Asst. Treasurer.*

APPENDIX OF FORMS

BOSTON PERSONAL PROPERTY TRUST

APPOINTMENT OF HENRY B. CABOT AS TRUSTEE

We, Moses Williams, A. Lawrence Lowell, Robert S. Minot, and Charles F. Adams, 2d, sole remaining Trustees under a Declaration of Trust dated January 10, 1893, deposited with the State Street Trust Company of Boston, acting under and by virtue of the powers to us given therein (see Clause 10), do hereby appoint Henry B. Cabot of Brookline in the County of Norfolk and Commonwealth of Massachusetts to be our Co-Trustee under said Declaration of Trust in the place and stead of Charles C. Jackson, resigned this day.

Witness our hands and seals at Boston, March 31, 1906.

Signed and	MOSES WILLIAMS,	}	<i>Sole</i>	(Seal)
sealed in	A. LAWRENCE LOWELL,		<i>Remaining</i>	(Seal)
presence	CHARLES F. ADAMS, 2d,		<i>Trustees</i>	(Seal)
of	ROBERT S. MINOT,		<i>as Aforesaid</i>	(Seal)

EDMUND W. YOUNG—to all

COMMONWEALTH OF MASSACHUSETTS }
SUFFOLK } ss.

March 31, 1906.

Then personally appeared the above-named Moses Williams, A. Lawrence Lowell, Robert S. Minot, and Charles F. Adams, 2d, and acknowledged the foregoing instrument to be their free act and deed.

Before me,

EDMUND W. YOUNG,
Notary Public.

(Notarial Seal)

A true copy of the original instrument on file with this Company.

STATE STREET TRUST CO.,
By E. W. FOOTE, *Asst. Treasurer.*

E
BUENA VISTA FRUIT COMPANY

(Frost v. Thompson, 219 Mass. 360)

BY-LAWS OF THE BUENA VISTA FRUIT COMPANY

ARTICLE I

Executive Board

The Trustees shall appoint an Executive Board of three who shall have the general direction, control and management of the property and business of the Company. They shall have ample power to purchase, lease, pledge and sell all such personal and real property, and to make all such contracts and agreements on behalf of the Company as they may deem needful or convenient for the successful prosecution of its business and operations. If in their opinion it shall be necessary for the Company to borrow or raise monies in payment for any real or personal property, or for any value received, or for any purpose of the Company as set forth in the Declaration of Trust, they may authorize the issue of notes or other obligations by the Company for monies so borrowed. They shall generally do such lawful acts, and adopt all such lawful measures consistent with the Declaration of Trust and the by-laws of the Company as they shall deem best calculated to promote to the fullest extent the interest of the stockholders and investors. The members of said Executive Board shall be designated as President, Treasurer and Secretary.

ARTICLE II

President

It shall be the duty of the president to preside at all meetings of the Trustees and shareholders; to sign all contracts in the name of the Company subject to the approval of the Executive Board of Trustees; and to perform any other acts incident to his office under the direction of the Trustees.

ARTICLE III

Treasurer

The treasurer shall have the custody of all monies, contracts, documents and other papers belonging to the Com-

APPENDIX OF FORMS

pany, and of its common seal, and shall safely keep the same, and shall collect all monies from time to time due and owing to the Company, and disburse the same pursuant to the contracts and obligations of the Company, or the order of its Trustees. He shall make, sign, endorse, and accept for and in the name and behalf of the Company, promissory notes, drafts and checks in the regular course of its business. He shall execute and deliver in behalf of the Company all such instruments under its common seal as he may be ordered by the Trustees, and shall affix the common seal to all certificates of stock issued by the Company, and shall perform such other duties as the Trustees may from time to time require.

The treasurer shall give a bond to the Company for the faithful performance of his duties, if required by the Trustees, in such sum and with such sureties as they may require. He shall be subject to such conditions and restrictions as may be made by the Trustees.

ARTICLE IV

Secretary

The secretary shall attend the meetings of the Trustees and shareholders and shall keep a record of the proceedings of the same at their respective meetings. He shall have the custody of all the books of the Company, and shall have the power, in the absence of the treasurer to sign receipts, checks, notes or other documents necessary in the conducting of the business affairs of the Company. He shall perform such other duties as the Trustees shall from time to time prescribe.

ARTICLE V

General Counsel

The Board of Trustees shall appoint a general counsel who shall be an attorney and counsellor-at-law. He alone shall act as the legal advisor of the Company, and any action of the Board of Trustees, Executive Board, or any other board or committee thereof, shall be subject to his approval, and his decision on all matters shall be final. He shall draft all bonds, deeds, obligations, contracts, leases and other legal documents of whatever nature that may be required by the Company. He shall be present at all meetings of the Trustees.

BUENA VISTA FRUIT COMPANY

ARTICLE VI

Finance Board

The Trustees shall appoint a finance board of two who shall meet at least once each month and approve all bills due and payable and when required examine all books of account and vouchers of the Company and make report.

ARTICLE VII

Land Board

The Trustees shall appoint a land board of two who shall have general supervision of the land location, streets, roads, buildings and other work on the plantation at Omaja, Cuba, as directed by the Executive Board of Trustees.

ARTICLE VIII

Meetings of the Trustees

The meetings of the Board of Trustees shall be held as often as the needs of the Company may in their opinion require, and may be called by the president or by the treasurer or by any trustee, and the secretary shall notify the trustees of such meeting, when requested, in writing. Said notice to be mailed twenty-four hours before the said meeting. Notice of any meeting may be dispensed with by each Trustee by a writing filed with the records of the meeting waiving such notice.

ARTICLE IX

Annual Meeting

The annual meeting of the Trustees shall be held on the first Tuesday of October in each year at the office of the Company in Boston, Mass. The fiscal year shall end with September 1st of each year.

ARTICLE X

Offices

The principal offices of the Company shall be in Boston, Massachusetts, with a branch office at Omaja, Cuba.

ARTICLE XI

Seal

The seal of the Company shall be circular in form and bear on its face the name of the Company and shall be capable of being impressed on paper.

APPENDIX OF FORMS

ARTICLE XII

Contracts for Sale of Land

All contracts for the sale of land made in the name of the Company shall be signed by the president and approved by the Executive Board of Trustees, and by the general counsel of the Company, and shall bear the imprint of the seal of the Company.

ARTICLE XIII

Contracts Registered

All contracts made in the name of the Company shall be registered by the secretary in a book kept for said purpose, and shall contain the names and addresses of the parties making said contracts.

ARTICLE XIV

Inspector

The contract holders in the Company shall annually appoint two of their number to go to Cuba and inspect the work and condition of the plantation of the Company, and shall make a report thereof. The entire expenses of said inspectors to be borne by the Company.

ARTICLE XV

Amendments

These by-laws may be altered, amended or repealed by vote of the Trustees or shareholders holding a majority of the shares issued by the Company, represented in person or by proxy, at any annual or special meeting of the Trustees or shareholders, provided notice of such proposed amendment shall be stated in the call for the meeting.

By-laws adopted.

HENRY RICHARDSON,
WILLIAM CARLETON,
GEO. B. GRAVES,
GEORGE L. DUNNING,
WALTER S. THOMPSON,
Trustees.

BUENA VISTA FRUIT COMPANY

BUENA VISTA FRUIT COMPANY

DECLARATION OF TRUST

AN AGREEMENT AND DECLARATION OF TRUST made this Twenty-seventh day of December, A.D. 1907, by and between the parties hereto establishing

THE BUENA VISTA FRUIT COMPANY

ARTICLE I

The Trustees under this agreement shall be, unless and until changed as hereinafter provided,

Henry Richardson
William Carleton
George B. Graves
George L. Dunning
Walter S. Thompson

who shall sign this instrument, which signatures shall be taken as conclusive as to their appointment and acceptance hereunder.

ARTICLE II

Henry Richardson
William Carleton
George B. Graves
George L. Dunning
Walter S. Thompson

Trustees hereunder, shall hold the title of all real estate and personal property acquired for the purposes of the trust, and shall execute all conveyances, assignments, transfers and instruments affecting the same for the purposes of the trust, and shall exercise all of the powers vested in them as such Trustees.

ARTICLE III

It is expressly understood and agreed that no title, interest or estate in any land, buildings or other property held by the said Trustees at any time hereunder, is to vest in any of the shareholders, but the same is to be and to remain in said Trustees, their successors and assigns; that

APPENDIX OF FORMS

the sole right, claim and interest of each shareholder shall be in the contract of the Trustees hereunder to hold, manage and dispose of said property and account for the income and proceeds thereof in the manner provided for in this instrument; and that the shares represented by the certificates, therefore, are to be and remain as to title personal property only, and held, bequeathed, assigned, disposed of and distributed as personal estate. At all meetings shareholders shall be entitled to one vote for each share and may vote by proxy.

ARTICLE IV

The terms "said Trustees" and "the Trustees" whenever used shall mean the Trustees above named and whoever may be Trustees for the time being.

ARTICLE V

All powers vested in the Trustees may be exercised by a majority of the Trustees for the time being or by the survivor or continuing Trustee in the event of a vacancy.

ARTICLE VI

The sum of \$10.00 shall constitute one share of the Trust and the certificate or certificates shall be issued therefor in such form as the Trustees may from time to time provide and shall be signed by a majority of the Trustees.

ARTICLE VII

The term "shareholder" used in this instrument shall mean the holder of a certificate of a share or shares issued under this Trust according to the records of the Trustees. Every such holder of a share or shares becomes a party hereto upon receiving a certificate therefor and ceases to be a party hereto upon parting with the same. The death of any shareholder during the continuance of this trust shall not operate to determine the trust nor shall it entitle the legal representative of such deceased shareholder to an account or to take any action in the courts or otherwise against the Trust or the Trustees; but the executors, administrators or assigns of the decedent shall accede to all the rights of the decedent under this trust upon proper proof of title. Shares shall be transferable as against the Trustees only on

BUENA VISTA FRUIT COMPANY

the books of the Trustees and upon the surrender of the outstanding certificate; and until such transfer the Trustees may deal with the record owner thereof and such dealings shall be conclusive upon all the parties.

ARTICLE VIII

The purposes of the Trust shall be:—

(a) To acquire any parcels or parcel of real estate or interest therein and manage, lease, develop, improve and hold, mortgage or sell the same.

(b) To enter into, execute, adopt and fulfil any contract for the erection, alteration or repair of any structure upon real estate.

(c) To act as agent or Trustee in the care and management of real and personal property committed to it by deed of Trust or otherwise; to receive for investment the funds of any person, firm or corporation or association and to pay out the same as directed by such person, firm, corporation or association and to deal and trade in stocks, bonds, securities, goods, wares and merchandise of every description.

(d) To have, purchase, convey, mortgage and lease within or without the Commonwealth of Massachusetts, such real or personal property as the purposes of the Trust may require.

(e) To do any and all of the things in this certificate set forth as business purposes, powers, or otherwise to the same extent and as fully as natural persons might or could do, and in any part of the world, as principals, agents, contractors, Trustees or otherwise.

ARTICLE IX

It shall be the duty of the Trustees subject to maintaining a proper cash balance to invest all monies coming to them in accordance with the provisions of Article 8 hereof. They shall keep full and proper books of account in such form as to distinctly show all receipts and their sources and all disbursements and their purposes; and keep other books in proper form to show the original and all other shareholders, their residences and shares held by each. They shall open their books at all times during business hours to the inspection of any shareholder and investor.

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ARTICLE X

The Trustees shall have power to employ such attorneys, agents, clerks and a treasurer, and to fix the duties to be performed by them, to hire such office room as they may deem expedient; to employ agents to procure contracts; to fix their own compensation; to use and expend the monies of the Trust in any way that in their judgment will advance the purposes of the trust or assist the accomplishment of its business; to deed, mortgage, lease, conveyance or other instrument; and to distribute ratably among the shareholders as dividends such portion of the net income as they may deem expedient. Their decision as to the ratable proportion due the several shareholders shall be final and payment of any dividend to stockholders of record shall be conclusive upon all parties.

ARTICLE XI

All contracts and engagements entered into by the Trustees and all conveyances and instruments executed by said Trustees shall be in their respective names as Trustees and shall provide against any personal liability on the part of the Trustees and stipulate that no other property shall be answerable than the property in the hands of the Trustees.

ARTICLE XII

The Trustees shall not be answerable for each other but each shall be answerable only for his own wilful default or neglect. No Trustee shall be required as such to furnish sureties.

ARTICLE XIII

Shareholders representing two-thirds in value of the outstanding shares may by a written notice remove either or any of the Trustees at any time without assigning any cause; but in the event of such removal the notice thereof shall appoint some person to fill the vacancy created. The notice of removal shall be addressed to each of the Trustees, shall state the fact of removal, the time the removal shall take effect, the name and address of the Trustee to fill the vacancy, and be signed by several shareholders who shall affix to their signatures the number of shares they respectively own. It

BUENA VISTA FRUIT COMPANY

shall be acknowledged by one or more of the signers and shall be served upon each of the Trustees within the state by copy by any officer qualified to serve civil process in the same manner that writs may be served and the original with the return thereof shall be recorded in the city clerk's records for Boston and the County of Suffolk within five days after its service is completed.

ARTICLE XIV

The office of Trustee may be vacated: —

- (a) By removal as provided in paragraph 13 hereof.
- (b) By written resignation addressed to the remaining Trustees and delivered to one of their number.

ARTICLE XV

Except as provided in paragraph 13 any vacancy in the office of Trustees shall be filled by the remaining Trustees by an appointment in writing under their hands; and upon executing these articles in token of his acceptance said appointee shall be a Trustee subject to all the provisions hereof.

ARTICLE XVI

The Trustees under this agreement, now or hereafter holding office, shall deliver to their successors all books, papers, writings and memoranda relating to the business of the trust, and shall execute such assignments, transfers and other conveyances that may be deemed advisable or expedient to facilitate the transaction of the business of the trust.

ARTICLE XVII

The Trust shall continue for the term of twenty years subject to the provisions, however, of the following paragraphs:

ARTICLE XVIII

The shareholders shall have power by writing signed by two shares in value of the shareholders: —

- (a) To terminate the Trust at any earlier period than that named in paragraph 17.
- (b) To terminate the Trust by requiring the Trustees to convey the trust estate to other or new Trustees upon a new

APPENDIX OF FORMS

Trust which shall be for the benefit of all the shareholders in proportion to their respective holdings.

(c) To terminate the Trust by requiring the Trustees to convey the Trust Estate to a corporation having power *inter alia* to receive the estate and invest the same as herein provided and whose shares shall be held by the shareholders hereunder in proportion to their respective holdings.

ARTICLE XIX

Upon the distribution or conveyance of the Trust Estate as provided in paragraphs 17 and 18, the Trustees shall be under no further liability to any persons.

ARTICLE XX

This agreement may be amended from time to time by a vote of holders of a majority of the outstanding shares and the amendments shall be a part of these articles and binding upon all parties hereto.

ARTICLE XXI

This instrument takes effect and becomes binding upon all present and future shareholders of stock of said association.

IN WITNESS WHEREOF the said Trustees have hereunto set their hands and seals in token of the acceptance of the trust.

(Signatures of Trustees)

(Acknowledgment by Trustees)

F

BOSTON SUBURBAN ELECTRIC COMPANIES

AGREEMENT AND DECLARATION OF TRUST OF THE BOSTON SUBURBAN ELECTRIC COMPANIES (AS AMENDED UNDER ARTICLE XIII, MAY 27 AND DECEMBER 5, 1907)

THIS AGREEMENT made this 25th day of November, 1901, by and between Adams D. Claffin, William F. Hammett and Alden E. Viles, together with their assigns, hereinafter designated as the "Subscribers," and Leonard D. Ahl, Adams D. Claffin, William H. Coolidge, William F. Hammett, Sydney Harwood, Frederic H. Lewis, George W. Morse, Horace B. Parker, Alfred Pierce, Frank W. Remick, James L. Richards, Charles W. Smith, Jerome C. Smith, R. Elmer Townsend and Alden E. Viles, together with their successors, hereinafter designated as the "Trustees," WITNESSETH: that

WHEREAS the subscribers propose to transfer, assign, convey and deliver to the trustees, or to cause to be transferred, assigned, conveyed and delivered to the trustees, under the designation of the Boston Suburban Electric Companies certain property as more particularly described and set forth in a schedule identified by the signatures of the parties hereto and filed with the trustees; and whereas the trustees, for the purpose of defining the interest of the subscribers and their assigns in such property, have agreed to issue to the subscribers negotiable certificates or evidences of interest as cestuis que trustent, to the number of forty-five thousand shares, of which twenty-five thousand shall be preferred and twenty thousand shall be common.

NOW, THEREFORE, the trustees hereby declare that they will hold said property so to be transferred to them, as well as all other property which may be hereafter transferred to them or which they may acquire as such trustees, together with the proceeds thereof, and all money and securities hereafter received by them in trust to manage, invest, reinvest and dispose of the same, and to collect, receive and distribute

APPENDIX OF FORMS

the income and profits thereof for the benefit of the holders from time to time of the certificates of shares from time to time issued and outstanding hereunder, in the manner and subject to the stipulations, conditions and limitations herein contained, to wit:

First. The trustees in their collective capacity, and so far as practicable and convenient, shall be designated by and act under the name of the Boston Suburban Electric Companies and under that name shall, so far as practicable, conduct all business and execute all instruments in writing in the performance of their trust.

Second. The trustees shall always be fifteen in number, and of the trustees herein mentioned by name, William H. Coolidge, Frederic H. Lewis, George W. Morse, Horace B. Parker and R. Elmer Townsend, shall hold office until the first annual meeting of the shareholders; Alfred Pierce, Frank W. Remick, James L. Richards, Charles W. Smith and Jerome C. Smith, shall hold office until the second annual meeting of the shareholders; and Leonard D. Ahl, Adams D. Claflin, William F. Hammett, Sydney Harwood and Alden E. Viles, shall hold office until the third annual meeting of the shareholders; except that said trustees, as well as any trustees hereafter elected, shall in all cases hold office until their successors have been elected and accepted this trust.

The shareholders shall at each annual meeting or adjournment thereof elect five trustees to serve for a term of three years next ensuing. In case of a vacancy arising in the board of trustees by failure to elect, resignation, inability to act or for any cause, the remaining trustees may appoint a trustee to fill such vacancy for the unexpired term.

Whenever any change shall occur in the board of trustees, the legal title to the stock and other property held in trust shall pass to, and vest in the successors of said trustees without any formal transfer thereof. But if at any time such formal transfer shall be deemed necessary or advisable, it shall be the duty of the board of trustees to obtain the same and it shall be the duty of any retiring trustee, or the administrator or executor of any deceased trustee to make said transfer.

Third. The trustees shall have and exercise the exclusive management and control of all property at any time belonging to this trust, with all the rights and powers of absolute owners thereof, subject only to the purpose of this agree-

BOSTON SUBURBAN ELECTRIC COMPANIES

ment; they may adopt and use a common seal; they shall have power to vote in person or by proxy upon all certificates of stock at any time belonging to the trust, and to collect, receive and receipt for the dividends thereon; to contract with each or any of the companies in which they may hold stock as said trustees in respect of any matter or matters relating to the conduct of the business of any such company or companies; to collect, sue for, receive and receipt for, all sums of money at any time coming due to said trust; to employ counsel; to begin, prosecute, defend and settle suits at law, in equity or otherwise, and to compromise or refer to arbitration any claims in favor of or against the trust; they may also, with the consent of not less than ten of their number given at a meeting called for that purpose, but not otherwise, exchange, upon such terms as may be agreed upon, the stock or securities held by them in any corporation for the stock or securities of any other corporation taking over the property of such corporation by consolidation or otherwise; may with such consent, but not otherwise, loan money to any corporations in which they may at any time own any shares of capital stock and may subscribe for or acquire additional stock or the securities or obligations of any such corporations; and may with such consent, but not otherwise, subscribe for, purchase, acquire and hold the bonds of the United States, of any county or of any State, or of a county, city or town of any State of the United States of America, which has not at any time repudiated any of its debts; and may with such consent, but not otherwise, also subscribe for, purchase, acquire and hold shares in the capital stock or securities of any corporations, (1) owning or operating railways or railroads or engaged in the business of transporting merchandise, mails or express matter, or (2) engaged in whole or in part in supplying light, water, heat, power or entertainment, or (3) engaged in manufacturing or in any way dealing in any articles used by any such corporations, or (4) engaged in the business of insuring corporations of any or all of the foregoing classes against loss by fire or casualty, or (5) engaged in the business of advertising in the cars or upon the premises of railway or railroad companies, or (6) with the concurrent consent of the holders of a majority of each class of the outstanding shares given at a meeting called for that purpose, in the shares of

APPENDIX OF FORMS

stock and securities in any corporation engaged in any other business not hereinbefore included.

The trustees may also, with the consent of not less than ten of their number given as aforesaid, subscribe for, purchase or otherwise acquire and own the stocks, shares, obligations and securities of any trust, association or partnership engaged in whole or in part in any business of the character above specified, and the stock, shares, obligations and securities of any corporation, trust, association or partnership, including the stock, shares, obligations and securities of this trust, which owns, or whose stocks, shares, obligations or securities are based upon or secured by the stocks, shares, obligations or securities of any corporation, trust, association or partnership of the character above mentioned.

The trustees may also with the consent of not less than ten of their number given as aforesaid from time to time sell at public or private sale, release, exchange, mortgage, pledge or otherwise dispose of or encumber any or all of the property from time to time held by them, for such prices either in cash or in the stocks, shares, obligations or securities of other corporations, trusts, associations or partnerships, and upon such terms as to credit or otherwise as they may deem expedient.

So far as strangers to this trust are concerned, a resolution of the trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of the trustees, and no purchaser from the trustees shall be bound to see to the application of the purchase money or other consideration paid, or delivered by or for said purchaser to or for said trustees.

Fourth. Stated meetings of the trustees shall be held as they may from time to time, by vote or by-law, prescribe, and other meetings shall be held from time to time upon the call of the president, or any three of the trustees. A majority of the board shall constitute a quorum, and the concurrence of all the trustees shall not be necessary to the validity of any action done by them, but the wish of the majority of the trustees present and voting at any meeting, as evidenced by a resolution of such majority, shall be conclusive, except as hereinbefore or hereinafter specifically provided; and the certificate of the secretary of the trustees shall be conclusive as to the regularity of any meeting of the

BOSTON SUBURBAN ELECTRIC COMPANIES

trustees, the presence thereat, and concurrence in any action, vote or resolution there taken, of a majority of the trustees, and as to any other facts or statements in such certificate set forth. The trustees may make, adopt, amend or repeal such by-laws, rules and regulations not inconsistent with the terms of this instrument as they may deem necessary or desirable for the conduct of their business, and for the government of themselves and their agents, servants and representatives.

They may, as such trustees, hold either in their joint names, or in the name of the trust, or in their several names, or, under such safeguards against loss as may be advised by counsel, in the name of such other persons as they may from time to time determine, any of the property of the trust.

Fifth. The trustees shall annually elect from among their number a President and a Vice-President of the board, and shall also annually elect a Treasurer and a Secretary, and they shall have authority to appoint such other officers, agents and attorneys as they may from time to time deem necessary or expedient. They shall have authority to accept resignations and to fill any vacancy in the office of President, Vice-President, Treasurer, or Secretary, for the unexpired term; and shall likewise have authority to elect temporary officers, to serve during the absence or disability of regular officers. The President, Vice-President, Treasurer and Secretary shall have such authority and perform such duties as may from time to time be determined by the trustees. The Secretary shall be sworn to the faithful performance of his duties. The trustees shall fix the compensation, if any, of all officers and agents whom they may appoint, and are likewise authorized to pay to themselves such compensation for their own services as they may deem reasonable, not exceeding, however, in the aggregate, the amount of one per centum on the gross income of the trust property in lieu of the percentage upon the gross income, as usually allowed by the Courts of the Commonwealth of Massachusetts to trustees under wills and other instruments, but any trustee may be employed by the trustees to perform any special, legal, financial or other service and may be elected or appointed to any office, and shall in any such case be entitled to receive such additional compensation as the trustees may fix and determine; the aggregate compensation,

APPENDIX OF FORMS

and the limitation thereof hereinbefore stated being intended and hereby declared to be only for the general services of the trustees in their collective capacity as custodians and managers of the trust property. Any trustee may acquire, hold, own and dispose of shares in the trust in his individual name, and on his personal account, or jointly with other persons, or as a member of a firm, without being thereby disqualified to act as a trustee, and, while so owning and holding any trust certificates on his personal account, shall be entitled to all and the same rights and privileges of and as any other shareholder. The trustees may also appoint from among their number an executive committee of three or more persons, to whom they may delegate such of the powers herein conferred upon the trustees as they may deem expedient, except so far as those matters are concerned in which the concurrent action of at least ten trustees is required.

The trustees shall not be liable for errors of judgment either in holding property originally conveyed to them or in acquiring and afterwards holding additional property, nor for any loss, arising out of any investment, nor for any act, or omission to act, performed or omitted by them, in the execution of this trust in good faith; nor shall they or any or either of them, be liable for the acts or omissions of each other, or of any officer, agent, or servant appointed by or acting for them, and they shall not be obliged to give any bond to secure the due performance of this trust by them.

Sixth. Shares hereunder shall be divided into preferred and common shares. The preferred shares shall entitle the holder to a cumulative quarterly dividend at the rate of four dollars per annum, and no more, the same to be paid or set apart out of the net earnings before any dividend shall be paid or set apart for the common shares; and in case of liquidation, the proceeds of the liquidation shall be first applied to the payment to the registered holders of preferred shares of the sum of one hundred dollars per share and any accrued and unpaid dividends thereon, and the balance remaining thereafter shall be divided among the registered holders of common shares in proportion to their holdings. As evidence of the ownership of said shares, the trustees shall cause to be issued to each shareholder a negotiable certificate or certificates, which certificates shall be substantially in the form following, to wit:

BOSTON SUBURBAN ELECTRIC COMPANIES

(Form of Certificate of Preferred Shares.)

BOSTON SUBURBAN ELECTRIC COMPANIES

No. Shares.

Not Subject to Assessment

This certifies that
..... is the holder of
preferred shares in the Boston Suburban Electric Companies, which he holds subject to an Agreement and Declaration of Trust, dated November 1901, and on file with the Boston Safe Deposit & Trust Company which is hereby referred to and made a part of this certificate.

The shares in said Boston Suburban Electric Companies are divided into two classes, known as preferred and common, and the holders of the preferred shares are entitled to receive dividends out of the net earnings of the Companies, at the rate of four dollars per annum, and no more, payable quarterly, in each year, which shall be paid or set apart before any dividends shall be paid or set apart on the common shares.

The dividends on the preferred shares are cumulative and if, in any period of three months, quarterly dividends at the rate of four dollars per annum are not paid on said preferred shares, the accrued and unpaid dividends are a charge on the net earnings of the Companies, payable subsequently before any dividends are paid upon the common shares.

In the event of liquidation, the proceeds of liquidation will be first applied to the payment to the holders of preferred shares of the sum of one hundred (100) dollars per share and any accrued or unpaid dividends thereon; and the balance remaining thereafter will be divided among the holders of common shares in proportion to their holdings.

This certificate must be signed by the Transfer Agent, and by the Agent to register transfers; and no transfer hereof will be of any effect as regards the Boston Suburban Electric Companies until this certificate has been surrendered and the transfer recorded upon their books.

In witness whereof, the trustees under said Declaration of Trust, herein designated as the Boston Suburban Electric

APPENDIX OF FORMS

Companies, have caused their common seal to be hereto affixed and this certificate to be executed in their name and behalf by their President and Treasurer.

BOSTON SUBURBAN ELECTRIC COMPANIES.

By.....
President.

Attest:
Treasurer.

BOSTON SAFE DEPOSIT & TRUST CO.

Transfer Agent.

By.....
By.....

MASSACHUSETTS NATIONAL BANK,

Agent to Register Transfers.

By.....

(Form of Transfer)

For value received I hereby sell, assign, transfer, and deliver to.....
.....of the within
named shares of the Boston Suburban Electric Companies,
I hereby request that said transfer be recorded on the books
of said Companies. .

WITNESS my hand, this.....day of.....
.....19.....

Witness,.....

(Form of Certificate of Common Shares)

BOSTON SUBURBAN ELECTRIC COMPANIES

No.....Shares.

Not Subject to Assessment.

This certifies that.....is the
holder of.....common shares in the
Boston Suburban Electric Companies, which he holds sub-
ject to an Agreement and Declaration of Trust, dated
November.....1901, and on file with the Boston Safe
Deposit & Trust Company which is hereby referred to and
made a part of this certificate.

BOSTON SUBURBAN ELECTRIC COMPANIES

The shares in said Boston Suburban Electric Companies are divided into two classes known as preferred and common, and the holders of the preferred shares are entitled to receive dividends out of the net earnings of the Companies, at the rate of four dollars per annum, and no more, payable quarterly in each year, which shall be paid or set apart before any dividends shall be paid or set apart on the common shares.

The dividends on the preferred shares are cumulative and if, in any period of three months, quarterly dividends at the rate of four dollars per annum are not paid on said preferred shares, the accrued and unpaid dividends are a charge on the net earnings of the Companies, payable subsequently before any dividends are paid upon the common shares.

In the event of liquidation, the proceeds of liquidation will be first applied to the payment to the holders of preferred shares of the sum of one hundred (100) dollars per share and any accrued and unpaid dividends thereon; and the balance remaining thereafter will be divided among the holders of common shares in proportion to their holdings.

This certificate must be signed by the Transfer Agent, and by the Agent to register transfers; and no transfer hereof will be of any effect as regards the Boston Suburban Electric Companies until this certificate has been surrendered and the transfer recorded upon their books.

In witness whereof, the trustees under said Declaration of Trust, herein designated as the Boston Suburban Electric Companies have caused their common seal to be hereto affixed and this certificate to be executed in their name and behalf by their President and Treasurer.

BOSTON SUBURBAN ELECTRIC COMPANIES.

By
President.

Attest:
Treasurer.

BOSTON SAFE DEPOSIT & TRUST CO.

Transfer Agent.

By
By

MASSACHUSETTS NATIONAL BANK,

Agent to Register Transfers.

By

APPENDIX OF FORMS

(Form of Transfer)

For value received I hereby sell, assign, transfer, and deliver to
..... of the within named shares of the Boston Suburban Electric Companies and I hereby request that said transfer be recorded on the books of said Companies.

WITNESS my hand, this day of 19...

Witness,.....

Said certificates may be transferred at any time by the registered holders thereof, or by their personal representatives, such transfer to be made by delivery of the certificates to the transferee, together with a written transfer of the same of a written power of attorney to sell, assign and transfer the same, signed by the registered holder of the certificate or his personal representatives; but no such transfer shall affect the right of the trustees to treat the registered holder of the certificate as the holder in fact until the certificate has been surrendered and the transfer has been duly recorded on the books of the trustees. Each transferee or holder of the certificate shall be held by the fact of his acceptance of it to have assented to the trusts and agreements herein set forth.

In case of the loss or destruction of any certificate issued by the trustees, the trustees may, under such conditions as they may deem expedient, issue a new certificate or certificates in the place of the one lost or destroyed.

Seventh. The trustees may, from time to time, for the purpose of providing means for the acquisition of additional property or otherwise accomplishing the purposes of this trust, with the consent of not less than ten of their number given at a meeting called for that purpose, issue and dispose of shares in addition to those originally issued to subscribers as hereinbefore stated, so that the total number of shares issued shall be not exceeding in the aggregate thirty thousand preferred shares and thirty thousand common shares; and for said purposes with the concurrent consent of the holders of a majority of each class of the outstanding shares given at any meeting called for that purpose, borrow money or issue and dispose of shares in addition to the aggregate number above mentioned, upon such terms and in such manner as the shareholders at such meeting may determine.

BOSTON SUBURBAN ELECTRIC COMPANIES

Except with such concurrent consent no money shall be borrowed and no shares shall be issued by the trustees to an amount exceeding thirty thousand preferred shares and thirty thousand common shares.

Eight. The trustees may, from time to time, declare and pay dividends out of the net income from time to time received by them from dividends upon the stocks and interest upon the bonds, notes and other obligations, and from the income or profit from other investments of the trust funds held by the trustees under this agreement and declaration of trust, but the amount of such dividends and the payment of them shall be wholly in the discretion of the trustees; and the trustees shall have full power and authority to determine what portion of any receipts or expenditures ought in fairness to be treated as income, and shall have authority to reserve in each year such a sum as they deem wise from the gross income actually collected as a reserve or surplus fund, with power to use said fund or the proceeds thereof at any time for the maintenance of dividends, or to treat the same or any part thereof, as surplus capital, and to change their determination as to said fund, or any part thereof, from time to time as to them may seem prudent and expedient, absolutely at their own discretion; except that the dividends on the preferred shares shall not begin to accrue until January 15th, 1902, and shall be payable quarterly on the Fifteenth days of January, April, July and October, in each year, beginning April 15th, 1902, at the rate of four dollars per annum, and no more, and shall be cumulative, and said quarterly dividends shall be paid or set apart before any dividends are paid on the common shares.

Ninth. The fiscal year of the trustees shall end on the thirtieth day of September in each year. Annual meetings, for the election of five trustees and for the transaction of other business, shall be held in Boston on the Thursday following the first Monday of December, in each year, beginning with the year 1902, of which meetings notice shall be given by the Secretary, by mail, to each shareholder, at his registered address, at least seven days before said meeting.

Special meetings of the shareholders may be called at any time, upon seven days' notice, given as above stated, when ordered by the President or trustees. At all meetings of the

APPENDIX OF FORMS

shareholders, each holder of shares, whether preferred or common, shall be entitled to one vote for each share held by him, and any shareholder may vote by proxy.

No business shall be transacted at any special meeting of the shareholders, unless notice of such business has been given in the call for the meeting.

No business except to adjourn shall be transacted at any meeting of the shareholders unless the holders of a majority of all the shares outstanding are present in person or by proxy.

Tenth. The death of a shareholder or trustee during the continuance of this trust shall not operate to determine the trust, nor shall it entitle the legal representatives of the deceased shareholder to an accounting, or to take any action in the courts or elsewhere, against the trustees; but the executors, administrators, or assigns of any deceased shareholder, shall succeed to the rights of said decedent under this trust upon the surrender of the certificate or the certificates owned by him.

The ownership of shares hereunder shall not entitle the shareholders to any share in or to the trust property whatsoever, or right to call for a partition or division of the same. And it is hereby expressly declared and agreed that a trust, and not a partnership, is created by this instrument, and that the shareholders are cestuis que trustent, and hold no other relation to the trustees than those of cestuis que trustent with only such rights as are conferred upon them as such cestuis que trustent hereunder.

Eleventh. The trustees shall have no power to bind the shareholders personally, and the subscribers and their assigns, and all persons or corporations extending credit to, contracting with, or having any claim against the trustees, shall look only to the funds and property of the trust for payment under such contract or claim, or for the payment of any debt, damage, judgment or decree, or of any money that may otherwise become due or payable to them from the trustees, so that neither the trustees nor the shareholders, present or future shall be personally liable therefor.

In every written order, contract or obligation which the trustees shall give or enter into, it shall be the duty of the trustees to refer to this declaration and to stipulate that neither the trustees nor the shareholders shall be held to any

BOSTON SUBURBAN ELECTRIC COMPANIES

personal liability under or by reason of such order, contract or obligation.

The purpose of this trust being to hold for investment and profit for the benefit of the shareholders as cestuis que trustent, all the stocks, bonds, securities and other property assigned, transferred and conveyed or caused to be assigned, transferred and conveyed by the subscribers to the trustees, and to make such further investments as may be from time to time determined upon in accordance with the provisions hereof, and from time to time to change such investments and to re-invest the proceeds realized from the sale of any of the trust property, and to invest such further funds and moneys as may at any time be paid to or come into the possession of the trustees for investment; it is understood and agreed that the trustees as such shall have no power to, and shall not at any time engage in, any business of any kind other than the purchase, holding and sale of property as and for investments, nor to make any contracts except such as relate to the purposes aforesaid, or are incidental thereto, or such as are in this declaration either specifically authorized or to be reasonably implied; but in construing the terms and provisions of this declaration and the authority by it conferred upon the trustees, they shall be the sole judges and their decision, or that of a majority of them in any doubtful case, or in any case, where a question arises, shall be conclusive and binding.

Twelfth. This trust shall continue for the term of twenty-one years, at which time the then board of trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the holders of preferred and common shares according to the priorities hereinbefore expressed; provided, however, that if prior to the expiration of said period, the holders of at least two-thirds of the shares then outstanding shall, at a meeting called for that purpose, vote to terminate or continue this trust, then said trust shall either terminate or continue in existence for such further period as may then be determined; provided further, however, that upon the request of the holders of at least two-thirds of each class of the shares then outstanding by vote or resolution thereof at a meeting of the shareholders called for that purpose the trustees may, if it seems to them judicious so to do, convey the trust property to new or other

APPENDIX OF FORMS

trustees, or to a corporation according to the terms of such request and in the manner stated therein, being first duly indemnified for any outstanding obligations; and the then trustees upon filing with the said Boston Safe Deposit and Trust Company their certificate, or that of a majority of their number that they have complied with such request, shall be under no further obligations; provided further, however, that it is especially understood and agreed that nothing in this provision contained shall be construed as making it obligatory upon the trustees to comply with such request. For the purpose of winding up its affairs and liquidating the assets of the trust the then board of trustees shall continue in office until such duties have been duly performed.

Thirteenth. This agreement and declaration of trust may be amended or altered, except as regards the liabilities of the trustees, at any annual or special meeting of the shareholders with the consent of the holders of at least two-thirds of the shares of each class then outstanding; provided notice of the proposed amendment or alteration shall have been given in the call for the meeting; and in case of such alteration or amendment, the same shall be attached to and made a part of this agreement, and a copy thereof shall be filed with the Boston Safe Deposit & Trust Company.

Fourteenth. The word "Trustees," and the expression "said trustees," and "the trustees," as used in this instrument shall mean the trustees for the time being under these presents and the word "shareholders" whenever used in this instrument, and whenever the context does not clearly require another meaning, shall mean and refer to the holders for the time being of the issued and outstanding certificates in the Boston Suburban Electric Companies.

IN WITNESS WHEREOF, the said Leonard D. Ahl, Adams D. Claflin, William H. Coolidge, William F. Hammett, Sydney Harwood, Frederic H. Lewis, George W. Morse, Horace B. Parker, Alfred Pierce, Frank W. Remick, James L. Richards, Charles W. Smith, Jerome C. Smith, R. Elmer Townsend and Alden E. Viles, hereinbefore mentioned, have hereunto set their hands and seals, in token of their acceptance of the trust hereinbefore mentioned, for themselves and their successors, and the said Adams D. Claflin, William F. Hammett and Alden E. Viles, have hereunto

BOSTON SUBURBAN ELECTRIC COMPANIES

set their hands and seals, in token of their assent to and approval of said terms of trust, for themselves and their assigns, the day and year first above written.

Filed in the Office of the Commissioner of Corporations,
June 2, 1910.

G

LUDLOW MANUFACTURING ASSOCIATES

DECLARATION OF TRUST

[Dated January 1st, 1902. In this reprint are incorporated the several amendments to the original Trust Declaration made January 14th, 1904, and December 19th, 1911. Filed with the Old Colony Trust Company of Boston.]

WHEREAS, the Ludlow Manufacturing Company, a corporation duly incorporated under the laws of the Commonwealth of Massachusetts, pursuant to votes of its Directors and stockholders, has conveyed and transferred to Richard H. Weld, Charles W. Hubbard, Cranmore N. Wallace, John E. Stevens, Ernest W. Bowditch, Francis Blake, William D. Winsor, Emor H. Harding, Henry O. Underwood, Trustees, all its property real and personal and of whatever nature, except the property real and personal described in a schedule hereto annexed marked "A"; and

WHEREAS, the stockholders of said Company have also respectively transferred to said Trustees their several holdings of the shares of said Company; and

WHEREAS, all the said property and shares so conveyed and transferred to the Trustees, together with any other property hereafter acquired by them, is and are to be held, used, and managed upon the trusts herein declared, and for the convenient definition of the several interests in said trust property of the stockholders of said corporation, their assigns and legal representatives, the same has been divided into Thirty thousand (30,000) shares of the par value of One hundred dollars (\$100) each, negotiable certificates for which are to be issued to said stockholders, their assigns and legal

LUDLOW MANUFACTURING ASSOCIATES

representatives, in the proportion of their holdings of stock in said corporation as shown by its books on the first day of January, 1902.

THE SAID TRUSTEES HEREBY DECLARE that all the property and shares conveyed to them as aforesaid, together with any hereafter acquired by them under the provisions of this instrument, is and are to be held for the account and benefit of the holders from time to time of the certificates of shares issued hereunder, and is and are to be held, used, managed, and administered upon the trusts and in the manner following: —

ARTICLE I

The said Trustees, designating themselves so far as may be convenient and proper by the name of the "Ludlow Manufacturing Associates," may use and employ the trust property and assets:

First. In paying the corporate debts of said Ludlow Manufacturing Company and in discharging the liabilities under contract or otherwise of said Corporation;

Second. In the manufacture at Ludlow, Springfield, or Wilbraham, of flax, hemp, jute, cotton, wool, silk, and other fibres, and in the manufacture of paper and carpets, and of machinery or other articles composed in whole or in part of wood or metal — the said manufacturing enterprises to be carried on either directly or through corporations or other organizations in which the Trustees own a controlling interest;

Third. In investments in the shares of any electric light, railroad, or power company operating in whole or in part in the City of Springfield, or in the towns of Palmer, Chicopee, Ludlow, and Wilbraham, and in contracts with any such company or any other company for the purchase or sale of electricity;

Fourth. In establishing at any other place or places within or without the Commonwealth industries similar to those now or hereafter established on their properties in Ludlow, Springfield, or Wilbraham whenever the interests of said last named industries may render such course advisable — such establishment to be effected by new construction, by the purchase in whole or in part of

APPENDIX OF FORMS

existing plants, or by giving in exchange for the stock or securities of any corporation or other organization other securities owned by the Trustees or shares issued under this instrument;

Fifth. In the purchase, sale, renting, or leasing of real estate and power of any description, as the interests of the Trust may from time to time require, and in improving and developing any real estate or water power held by them by the building of storage reservoirs, the erection of buildings, the construction of streets and sewers, and by all other methods conducive in the judgment of the Trustees, to the wise and profitable use of said real estate or of said water power.

To enable the Trustees to fully execute this Trust, they are hereby empowered: —

1. To carry on any business above described according to their discretion and to employ therein such agents or agencies as they may deem expedient;

2. To pay all taxes, assessments, and necessary expenses;

3. To buy any property, real or personal, including shares or obligations issued hereunder, and any rights, franchises, privileges, or securities which the conduct of any business above described may in their judgment require, or which may in their judgment tend to promote its successful prosecution or the interest of the shareholders, and to hold, use, lease, or sell the trust property or any part thereof (except as hereinafter provided) at their discretion;

4. To borrow money for any business above described or for the purchase of any property herein authorized and to give notes, make contracts of guaranty or suretyship, or enter into other obligations therefor, and to pledge the personal property of the Trust or any part thereof (except as hereinafter provided) to secure such notes or obligations or any contract entered into in the course of the execution of this Trust; provided, however, that all notes or obligations given for money borrowed shall bear the written approval of at least one Trustee in addition to the signature of the Treasurer or other authorized officer;

5. To create a reserve fund by investing in any securities that are legal investments for the savings banks of the Com-

LUDLOW MANUFACTURING ASSOCIATES

monwealth of Massachusetts or of the State of New York; also to make loans upon such collateral securities or endorsements as are prescribed by statute in the case of loans by the savings banks of the Commonwealth of Massachusetts or of the State of New York.

6. To exercise exclusive control and management of the trust property; to vote in person or by proxy upon all shares of stock belonging to the Trust and to collect and receipt for any dividends thereon, provided, however, that shares issued hereunder and purchased by the Trustees for the account of the Trust shall not, so long as they belong to the Trust, either receive dividends or be voted at any meeting of shareholders; to contract with any company controlled by them, to begin and defend legal proceedings, employ counsel, and compromise or arbitrate claims; and generally to do all acts and things necessary and proper for the complete execution of this Trust and the protection of the interests of shareholders therein, provided, however, that the Trustees shall have no power to bind the shareholders personally by any contract, express or implied, or by any act, neglect, or default; that neither Trustees nor shareholders shall be personally liable on any such contract or for any such act, neglect, or default, and that any party to such contract or injured by such act, neglect, or default shall have recourse for satisfaction, payment, or indemnity solely to the trust estate; that for any judgment recovered against and paid by the Trustees, they shall be entitled to reimburse themselves from the trust estate; and that every note, bond, obligation, or contract in writing made or given by the Trustees shall, by explicit reference to this Declaration of Trust, give notice of the limitations upon the power of the Trustees and of the exemption from personal liability of both Trustees and shareholders and shall contain an express declaration that no recourse shall be had in any event to any Trustee or shareholder.

No sale or mortgage of the real estate of the Trust nor of any of its industrial establishments nor of the stock of the Ludlow Manufacturing Company, and no lease of real estate or power belonging to the Trust and exceeding the annual rental value of Ten thousand dollars (\$10,000) shall be made by the Trustees until the same shall have been first approved

APPENDIX OF FORMS

by the vote of two-thirds in interest of the shares entitled to vote under this Declaration of Trust and voted by the holders thereof in person or by proxy at an annual or special meeting notified as herein prescribed and the call for which shall state that such sale, mortgage, or lease is to be acted upon at said meeting.

Shares issued hereunder and bought by the Trustees for the account of the Trust shall be reported to the shareholders at the next annual meeting after such purchase and be disposed of as said meeting may determine.

ARTICLE II

A majority of the Trustees shall constitute a quorum and any action taken at a meeting at which a quorum is present and which meeting has been duly notified in the manner previously prescribed by the Trustees shall be operative and effective as the act of all the Trustees; provided, however, that the approval of six (6) Trustees given at a duly notified meeting shall be necessary for action on all matters relating to the loaning of money, the absorption of new plants either by purchase or otherwise, the starting of new industries in Ludlow, Springfield, or Wilbraham, and the establishment of branch industries elsewhere.

In no event shall any purchaser be bound to see to the application of the purchase money or other consideration received or realized upon the execution of any deed, bill of sale, mortgage, transfer, or other conveyance authorized as aforesaid, and so far as strangers to the Trust are concerned, a resolution of the Trustees certified as such by their Secretary and authorizing a particular act to be done shall be conclusive evidence that such act is within the powers of the Trustees.

The Trustees shall annually elect from among their number a President, and shall elect from among their number or otherwise, a Treasurer, Secretary, and in their discretion, Vice-Presidents, Assistant Treasurers, Assistant Secretaries, and such other officers or agents as they may deem advisable, and may act in any manner by or through any such officer or agent.

The Trustees may adopt and amend from time to time by-laws for the conduct of their business, and in such by-

LUDLOW MANUFACTURING ASSOCIATES

laws or in regulations adopted at any meeting, may define duties of their officers, agents, servants and representatives.

ARTICLE III

The title to the trust property of every description and the right to the conduct of any business hereinbefore described are vested exclusively in the Trustees, so that shareholders are without interest therein other than that conferred by their shares issued hereunder, and shall have no right to call for any partition, accounting, or division of property, profits, rights, or interests.

Shares shall be personal property giving only the rights in this instrument and in the certificates thereof specifically set forth. The death of a shareholder during the continuance of this Trust shall not terminate the Trust nor give his or her legal representatives a right to an account or to take any action in the courts or otherwise against other shareholders or the Trustees, but shall simply entitle the legal representatives of the deceased to demand and receive a new certificate of shares in place of the certificate held by the deceased, upon the acceptance of which such legal representatives shall succeed to all the rights of the deceased under this Trust.

ARTICLE IV

The profits arising from the conduct of the affairs of the Trust shall from time to time and whenever the Trustees shall so order be ratably divided among the shareholders of record at the time of declaring a dividend.

The Trustees, however, may always retain such amount of such profits as they may deem necessary to pay debts or expenses or meet obligations relating to the Trust or as they may deem desirable to use in the conduct of its affairs.

ARTICLE V

The shares issuable hereunder by the Trustees at the inception of this Trust to stockholders of the Ludlow Manufacturing Company, their assigns or legal representatives — in the proportion of their several holdings — each share to be of the par value of One hundred dollars (\$100) — shall be Thirty thousand (30,000) in all and shall be evidenced by a negotiable certificate or certificates in the form following: —

APPENDIX OF FORMS

(Form of Certificate of Shares)

"LUDLOW MANUFACTURING ASSOCIATES

No.....Shares

This certifies that.....the holder....of.....() shares — par value One hundred dollars (\$100) each — of the property held and administered in trust by Trustees acting under the name of the Ludlow Manufacturing Associates and in accordance with and subject to a Declaration of Trust dated January 1, 1902, which is on file with the Old Colony Trust Company and which is hereby referred to and made a part of this certificate.

This certificate must be signed by the Old Colony Trust Company, Transfer Agent, and no transfer hereof shall be effectual as regards the Ludlow Manufacturing Associates until this certificate has been surrendered and the transfer recorded upon the books of said Transfer Agent.

IN WITNESS WHEREOF the Trustees under said Declaration of Trust herein designated as the Ludlow Manufacturing Associates have caused their common seal to be hereto affixed and this certificate to be executed in their name and behalf by their President and attested by their Secretary this.....day of.....19.....

LUDLOW MANUFACTURING ASSOCIATES,

By.....
President.

Attest:
Secretary.

Signed:.....

OLD COLONY TRUST COMPANY,
Transfer Agent.

By.....
Assistant Secretary.

By.....
Transfer Clerk."

LUDLOW MANUFACTURING ASSOCIATES

(Form of Transfer of Shares)

For value received.....hereby sell, assign, transfer, and deliver to..... the within named shares of the Ludlow Manufacturing Associates and request that said transfer be recorded on the books of said Transfer Agent.

Witness.....hand.....this.....
.....day of.....19....

The Trustees shall keep books of record of the certificates of shares originally issued hereunder and of all transfers thereof. Upon any transfer thereof, a new certificate or new certificates shall be issued, being first recorded and signed by the Transfer Agent appointed by the Trustees, and only shareholders whose certificates are so recorded shall be entitled to vote, or to collect dividends, or to otherwise exercise and enjoy the rights of shareholders.

Each shareholder shall in writing notify the Treasurer of the Trustees of his post-office address — which may be changed by a like notice — and in the absence of any such notice from a shareholder his post-office address shall be taken to be Boston. The Treasurer shall file a memorandum of the addresses of shareholders with the Transfer Agent and keep it informed of any changes therein.

In case of the loss, mutilation, or destruction of a certificate, the Trustees may issue a new one upon such terms as they see fit.

ARTICLE VI

The Trustees may, from time to time, with the consent of the holders of two-thirds in interest of the shares entitled to vote under this Declaration of Trust and voted at a meeting the call for which shall contain specific notice of the proposition to be submitted, issue and dispose of additional shares for such purpose and in such manner as the shareholders at such meeting may decide.

ARTICLE VII

The Trustees shall always be nine (9) in number, and of the Trustees herein mentioned by name Francis Blake, Cranmore N. Wallace, Richard H. Weld, shall hold office until the first annual meeting of the shareholders; Ernest

APPENDIX OF FORMS

W. Bowditch, Emor H. Harding, Charles W. Hubbard shall hold office until the second annual meeting of the shareholders; and John E. Stevens, Henry O. Underwood, William D. Winsor shall hold office until the third annual meeting of the shareholders, except that said Trustees as well as any Trustees hereafter elected shall in all cases hold office until their successors have been elected and have accepted this Trust; provided, however, that by written notice delivered or mailed to the Secretary or President a Trustee may resign and that such resignation shall take effect either immediately or at a later date according to the terms of said notice.

Stated meetings of the Trustees shall be held at least once a month and other meetings shall be held from time to time upon the call of the President or any three (3) of the Trustees. The vote of an absent Trustee may be counted provided that the vote in the form entered upon the records is signed by him and attached to the records, and for the purpose of passing said vote but no other he may be considered as present if necessary to form a quorum.

The Trustees may adopt, and from time to time amend or repeal, such by-laws, rules, and regulations not inconsistent with the terms of this instrument as they may deem necessary or desirable for the conduct of business and the government of themselves and their agents.

The Trustees shall not be liable for errors of judgment either in holding property originally conveyed to them or in acquiring and afterwards holding additional property, or for any loss resulting from any investment, or from any act or omission to act performed or omitted by them in the execution of this Trust in good faith. They shall not be liable for the acts or omissions of any officer, agent, or servant appointed by or acting for them, nor be obliged to give any bond to secure the due discharge of their trust, nor shall any Trustee be liable for any act or default of any other Trustee.

ARTICLE VIII

The fiscal year of the Trustees shall end on the last Saturday of December, or the first Saturday of January, whichever may be nearest the thirty-first of December. Each annual meeting shall be held in Boston on the third Tuesday in January of each year, beginning with the year 1913, of which meeting notice shall be given by the Secretary by

LUDLOW MANUFACTURING ASSOCIATES

mail to each shareholder at his registered address at least ten days before said meeting.

At each annual meeting of the shareholders, the Trustees shall make a full report upon the affairs of the Trust, and upon its business and operations during the year preceding, together with a statement of its financial standing as shown by the books and accounts of the Treasurer.

At each annual meeting shareholders shall elect three (3) Trustees to serve for the term of three (3) years next ensuing.

Upon the election of any Trustee by the shareholders or by the remaining Trustees, he shall execute an acceptance of this trust, which, together with a certificate of the Secretary of the Trustees of the election of such Trustee, shall be forthwith filed with the depositaries at that time having the custody of this instrument.

In case of the death, resignation, or inability to act of any Trustee, the remaining Trustees shall forthwith fill the vacancy for the unexpired term. Upon any election of Trustees by the shareholders, or by the remaining Trustees in the case of vacancy, the trust estate upon the acceptance of the Trust by the new Trustees or Trustee shall vest in them or him and the continuing Trustees without any further act or conveyance.

While any vacancy exists in the office of Trustee from whatever cause, the continuing or surviving Trustees or Trustee shall have all the powers and discharge all the duties granted or imposed by this instrument.

Each Trustee hereunder shall be the holder of at least Ten (10) shares and shall have the right to purchase at any public or private sale any shares or securities issued hereunder.

Special meetings of shareholders may be called at any time upon ten (10) days' notice given as above stated when ordered by the President or the Trustees. At all meetings of the shareholders each holder of shares, except as provided in Article 1, Section Fifth, Paragraph 6, shall be entitled to one (1) vote for each share held by him, and any shareholder may vote by proxy.

No business shall be transacted at any special meeting of shareholders unless notice of such business has been given in the call for the meeting.

No business except to adjourn shall be transacted at any meeting of shareholders unless a majority in interest of the

APPENDIX OF FORMS

shares entitled to vote under this Declaration of Trust are represented by the holders thereof in person or by proxy.

ARTICLE IX

This Trust, unless sooner terminated by the shareholders in the manner hereinafter provided, shall continue until the first day of January, 1950, unless all of said above-named Trustees and all successors to them now living shall have died more than twenty-one (21) years before said date, in which event this Trust shall terminate at the expiration of twenty-one (21) years from the death of the last survivor of said Trustees and said successors. At the termination of the Trust, the Trustees shall wind up the affairs and business of the Trust and, after paying and satisfying all obligations and liabilities thereof, shall divide the property then in their hands or its net proceeds ratably among the shareholders.

ARTICLE X

This Declaration of Trust may be altered or amended or this Trust terminated by the vote of two-thirds in interest of the shares entitled to vote hereunder and voted by the holders thereof in person or by proxy at any meeting of the shareholders duly notified pursuant to Article VIII by a call for such meeting in which it is specifically stated that such termination or such alteration or amendment is to be acted upon. In case of a vote in favor of such termination or of such alteration or amendment as the case may be, the President and the Secretary of such meeting shall certify such vote and any alterations or amendments so adopted in writing to the said Trustees, and, when the Transfer Agent has certified to the Trustees that the shareholders so voting were the owners of shares to the requisite number at the time of such meeting, the Trustees shall, if the vote is in favor of termination, proceed to wind up this Trust in accordance with Article IX, and in case such vote is in favor of alterations and amendments, shall embody the same in a Supplementary Declaration of Trust which they shall sign and deliver to said Old Colony Trust Company, and which, being so executed and delivered, shall be conclusive evidence of the due adoption by the shareholders of the alterations and amendments therein contained and thereafter shall have the same operation and effect as if originally embodied in this instrument.

LUDLOW MANUFACTURING ASSOCIATES

IN WITNESS WHEREOF the said Trustees above named have hereunto set their hands this first day of January, 1902.

RICHARD H. WELD,
CHARLES W. HUBBARD,
CRANMORE N. WALLACE,
JNO. ED. STEVENS,
ERNEST W. BOWDITCH,
FRANCIS BLAKE,
WILLIAM D. WINSOR,
EMOR H. HARDING,
H. O. UNDERWOOD,

Trustees.

CHARLES W. HUBBARD,
CRANMORE N. WALLACE,
ERNEST W. BOWDITCH,
FRANCIS BLAKE,
WILLIAM D. WINSOR,
EMOR H. HARDING,
H. O. UNDERWOOD,
SIDNEY STEVENS,
PHILIP STOCKTON,

Trustees.

COMMONWEALTH OF MASSACHUSETTS }
SUFFOLK } ss.

BOSTON, March 3, 1902.

Then personally appeared the above-named Richard H. Weld, Charles W. Hubbard, Cranmore N. Wallace, John E. Stevens, Ernest W. Bowditch, Francis Blake, Emor H. Harding, Henry O. Underwood, and severally acknowledged the foregoing instrument by them executed to be their free act and deed.

Before me,

CYRUS F. CUSHING,
Notary Public.

COMMONWEALTH OF PENNSYLVANIA }
CITY AND COUNTY OF PHILADELPHIA } ss.

FEBRUARY 20, 1902.

Personally appeared the above named William D. Winsor and acknowledged the foregoing instrument by him executed to be his free act and deed.

Before me,

THOS. J. HUNT,
*Commissioner for the Commonwealth
of Massachusetts, at Philadelphia,
Pennsylvania, 623 Walnut Street.*

(Seal)

H

BLANK HOTEL TRUST

This Indenture made at Boston in Massachusetts the of day in the year 1912 between of the one part and (hereinafter called the Trustees which expression shall extend to and include the trustees for the time being of these presents and the word Trustee shall apply to any one of the said trustees where the context so admits) of the other part.

Whereas the lands and other property of the said the particulars whereof are specified in the First Schedule hereto have been respectively transferred to the Trustees by the or are intended to be forthwith so transferred to the intent that the same shall be held upon the trusts hereinafter expressed concerning the same to be collectively designated as the Blank Hotel Trust.

Now this Indenture witnesseth and it is hereby agreed and declared that the Trustees shall hold the said real estate and other property and the investments for the time being representing the same and the property and effects at any time vested in them for the purposes of these presents (hereinafter called the trust premises) in trust to sell and convert into money the said real estate and to deal with the proceeds thereof and the other property comprised in these presents in the manner and with and subject to the powers and provisions hereinafter contained concerning the same for the benefit of the holders for the time being of the shares hereinafter mentioned (hereinafter called the Shareholders) according to the number of such shares held by them respectively. But the Trustees shall have power to postpone the conversion hereinbefore directed of the said real estate or any part thereof so long as they in their uncontrolled discretion shall think proper so that the same shall not be postponed beyond the time herein limited for the continuance of the trusts of these presents. And notwithstanding any

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postponement of such conversion the said real estate shall be considered as personal estate for the purposes of enjoyment and transmission and the rents and income thereof shall be applied as if they were the income of the proceeds of such conversion.

THE TRUSTEES

1. The Trustees shall have power at any time or times and from time to time.

(a) To manage and improve all lands and hereditaments for the time being subject to any of the trusts hereof and to erect pull down alter and repair buildings thereon and to make such outlay as they shall think proper for the said purposes and to insure buildings or the rents or rental value thereof against loss or damage by fire or other casualty and to insure against liability for damage to person or property arising from anything happening upon the said lands or on account of the condition thereof.

(b) To establish and carry on a hotel in the said buildings or any of them.

(c) To purchase or acquire by means of the trust premises any lands adjoining or near the lands specified in the said schedule hereto and any personal effects which they may think suitable or convenient for use in or about any of the said buildings or in connection with the said hotel.

(d) To grant or create any easement or other right or privilege over or in relation to any lands and hereditaments at the time subject to any of the trusts hereof and to purchase or acquire any easement or other right or privilege over other land to be annexed in enjoyment to any lands and hereditaments at the time subject to any of the trusts hereof and to release any easement or restrictive covenant agreement or provision over or affecting any other land for such consideration and upon such terms as the Trustees shall think fit.

(e) To grant leases at will or for any term of years in possession or reversion and to make allowances to and arrangements with tenants and others and to accept surrenders of leases and tenancies.

(f) To raise or secure for the purposes of the trusts of these presents such sums of money as they shall think proper

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and to mortgage or charge the whole or any part or parts of the trust premises in such manner and on such terms as they shall think proper for securing the repayment of any moneys so raised or secured and to pay off or enlarge the time for paying off any mortgage or charge for the time being existing or to make a new mortgage or charge for any sum or sums so secured.

(g) To sell the whole or any part of the trust premises in whatever state of investment the same may be.

(h) To invest or deal with the moneys forming part of the trust premises upon such securities or in such manner as may from time to time be determined by them.

(i) To distribute any of the property held by the Trustees among the Shareholders in specie.

(j) To cause any shares bonds or securities subject to the said trusts to be transferred into the names of or vested in the Trustees or any of them jointly with the right of survivorship or in any one of them in such manner as not to give notice that they are trustees thereof or that the same are affected by any trust or to allow such shares bonds or securities to remain in the name of or to be transferred into the name of any other person firm or corporation and to entrust to any incorporated trust company for safe keeping any or all of the bonds certificates securities and documents comprised in or relating to the trust premises.

(k) To employ such agents as they shall think proper for the management repair or insurance of any of the said property or in conducting the business of the said trusts and for seeing to the propriety and sufficiency of such repairs and insurance without the Trustees being answerable for the acts and defaults of such agents.

(l) To settle all accounts and to compound compromise abandon or adjust by arbitration or otherwise any actions suits proceedings disputes claims demands and things relating to the trust premises and to transfer to and deposit with any incorporated trust company or other persons any shares or securities forming part of the trust premises for the purposes of any arrangement for enforcing or protecting the interests of the Trustees or the owners of such shares or securities and to give time with or without security for the payment or delivery of any debts or property and to execute

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and enter into releases agreements and other instruments and do all other things proper for any such purpose to pay or satisfy any debts or claims upon any evidence that they shall think sufficient.

(m) To enter into arrangements expressed in writing for any of the purposes hereinbefore mentioned that the payment of any sum of money or the performance of anything that shall have been agreed upon shall be a floating charge upon the real and personal property for the time being subject to the trusts of these presents in such manner that the Trustees notwithstanding such charge may continue to deal with the said real and personal property by way of sale mortgage charge lease or otherwise or paying dividends out of profits in accordance with the trust hereof and that the Trustees shall not be liable for the payment of any such sum of money or for damages for non-performance of anything that shall have been agreed upon except out of the trust premises so far as the same shall be sufficient for the purpose and that no Trustee shall be in any way liable in respect thereof after he ceases to be a trustee of these presents and every such floating charge shall rank *pari passu* with every other such floating charge unless otherwise specially agreed. And any agreement entered into in pursuance of these presents in the name of — Hotel Trust shall without any express provisions to that effect operate as an arrangement with the Trustees for such a floating charge as above mentioned and words may be added to any document containing or relating to any such agreement or any part thereof to the effect that contracts made in that name operate as a floating charge created by the Trustees upon all the property comprised in these presents as herein provided and that the Trustees are not liable upon any such contract except for the application of such property in accordance with the provisions hereof and no liability attaches to the Shareholders.

(n) Generally in all matters not hereinbefore specified to deal with the trust premises and to manage and conduct the trusts hereof in any manner that they shall deem for the interest of the Shareholders as fully as if the Trustees were the absolute owners of the trust premises. And to execute and do all such agreements deeds instruments and things as they shall think proper for executing any of the powers or

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trusts contained in these presents and to authorize the execution of any such agreements deeds or instruments in their names by any of their officers or other persons.

2. The Trustees shall not be obliged to incur any personal liability in the execution of any of the trusts or powers herein contained and shall not have any power or authority to borrow money or incur any liability on the credit or behalf of the Shareholders or to make any contract binding them personally or be entitled to look to the Shareholders for indemnity against any liability incurred by the Trustees or any of them. But if the Trustees or any of them shall give their or his personal security for the payment of any money or otherwise incur any personal liability in respect of the premises such Trustees or Trustee shall be entitled to indemnity out of the property for the time being comprised in the trust premises against any and all liability arising out of the same.

3. All real estate at any time vested in the Trustees for any of the purposes of these presents shall be held by them upon the like trust for sale and conversion and the like powers and provisions in respect of postponement thereof and the application of the rents and income of the same as are herein contained concerning the real estate specified in the said schedule hereto.

4. In making any sale in pursuance of any of the powers or trusts herein contained the Trustees shall have power to sell by public auction or private contract and to buy in at any sale by auction or rescind or vary any contract of sale and to resell without being answerable for loss and for the said purposes the Trustees may do and execute all proper deeds instruments and things.

5. When any trustee is absent from Massachusetts New York Connecticut and Rhode Island and has been so absent for more than seven days or is unfit or incapable to act in the said trusts the other trustee or trustees for the time being of these presents may exercise the powers and authorities hereby given to the Trustees. And any trustee so absent or contemplating such absence may by power of attorney or otherwise empower any other trustee, so to act on his behalf and to use his name for execution or signature of documents for the purposes of the said trusts without being responsible for loss.

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6. Any trustee may retire and be discharged from the said trusts by delivering his resignation thereof in writing under his hand acknowledged in the manner required in the case of a deed of conveyance of land to any other trustee for the time being and such resignation shall be effectual and complete only upon the appointment of a new trustee or trustees in his place and meanwhile he shall continue to act as such trustee.

7. If any trustee for the time being of these presents shall die or resign or be removed or become unfit or incapable to act in the said trusts it shall be lawful for the surviving or continuing trustees or trustee for the time being (and for this purpose any retiring trustee shall if willing to act in the exercise of this power be considered a continuing trustee) to appoint by writing a new trustee or trustees in place of the trustee or trustees so dying resigning removed or becoming unfit or incapable to act as aforesaid. And upon every such appointment the number of trustees may be increased or diminished but not to less than two. And upon every such appointment such instruments shall be executed as shall be necessary or convenient for vesting the trust premises in the trustees or trustee for the time being or for providing evidence of such vesting independently of such appointment.

8. The Shareholders shall have power at any time or times to increase or reduce the number of Trustees (but they shall not reduce the number of Trustees to less than three) and to accept the resignation of any Trustee and to appoint any additional Trustee or Trustees.

9. The receipts of the Trustees or either or any of them or their agents in that behalf for moneys or things paid or delivered to them or him shall be effectual discharges to the persons paying or delivering the same therefrom and from all liability to see to the application thereof. And no purchaser or person dealing with the Trustees shall be bound to ascertain or inquire whether any resolution of the Shareholders as is herein required or provided for has been obtained or passed or as to the existence or occurrence of any event or purpose in or for which a sale mortgage pledge or charge is herein authorized or directed or otherwise as to the purpose or regularity of any of the acts of the Trustees purporting to be done in pursuance of any of the provisions or powers

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herein contained or as to the regularity of the discharge resignation or appointment of any Trustee and a transfer of the trust premises or any part thereof executed by the Trustee or Trustees in whom the same shall be vested at the time of any such discharge resignation or appointment for the purpose of vesting the same in the trustees for the time being of these presents or providing evidence of such vesting independently of such discharge resignation or appointment shall as to the property comprised in such transfer be conclusive evidence in favor of any such purchaser or other person dealing with the Trustees of the matters therein recited relating to such discharge resignation or appointment or the occasion thereof or the occasion of such transfer. And no purchaser or person dealing with any Trustee purporting to act during the absence unfitness or incapacity of any other Trustee or under any delegation of authority from any other Trustee shall be concerned to ascertain or inquire whether an occasion exists in which he is authorized so to act or in which such delegation is permitted or whether such delegated authority is still subsisting.

10. The Trustees shall not be liable for anything done or omitted by them in good faith and shall be answerable and accountable only for their own acts receipts neglects and defaults respectively and not for those of each other or any agent employed by them nor for any bank trust company broker or other person with whom or into whose hands any moneys or securities may be deposited or come nor for any defect in title of any property or securities acquired nor for any loss unless it shall happen through their own default respectively. And no Trustee however appointed shall be obliged to give any bond or surety or other security for the performance of any of his duties in the said trusts.

DURATION OF THE TRUSTS

11. The trusts contained in these presents shall continue in such manner that the Trustees shall have all the powers and discretions expressed to be given to them respectively by these presents and that no Shareholder shall be entitled to put an end to the same or to require a division of the trust premises or any part thereof except as herein provided until the expiration of seventy-five years from the date hereof or

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the expiration of twenty-one years from the death of the last survivor of the said and such other persons now living as shall hereafter become trustees of these presents before any person or persons not now living shall have become the only trustee or trustees thereof or the offices of trustees thereof shall have become entirely vacant whichever of the said periods shall first expire and at the expiration of the time so limited the said trusts shall terminate.

12. Upon the termination of the said trusts by the said limitation or under the provisions hereinafter contained the Trustees shall sell and convert into money the whole of the trust premises and shall apportion the proceeds thereof among the Shareholders ratably according to the number of the said shares held by them respectively subject to the preferences provided for the holders of preferred shares.

INCOME

13. The Trustees shall from time to time set apart out of the income of the trust premises as and for a surplus fund such sums if any as they may think proper. And the said surplus fund shall be applicable during the continuance of the said trusts to any purposes to which money forming part of the capital or income of the trust premises may be applied including the payment of future dividends.

14. Out of the residue of the income of the trust premises and of such part or parts if any of the surplus fund as the Trustees may think proper the Trustees may declare dividends among the Shareholders according to the number of shares held by them and the priorities attached to such shares respectively payable at such times as may be fixed by the Trustees. And the Trustees shall appropriate sufficient sums for the payment of the dividends so declared and shall pay the said dividends to the Shareholders at the time and in the manner so appointed. And the Shareholders shall have no right to any dividends except when and as declared by the Trustees.

15. The Trustees may determine the time of the commencement of the financial year and from time to time change the same. And until they shall change the same the financial year shall commence on the 1st of October in each

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year. In case the Trustees shall change the time of the commencement of the financial year and for the period preceding the first financial year they shall make proportionate adjustments of the income expenses taxes outgoings and dividends as they shall consider proper on account of the change. And taxes assessed on or after the 1st of April and before the 1st of October in the present or any subsequent calendar year shall for the purposes of these presents be treated as if they were assessed on the 1st of October so far as conveniently practicable.

SHARES

16. The beneficial interest of the Shareholders in the trust premises shall be divided into 3500 preferred shares of the nominal value of \$100 each and 7000 common shares of the nominal value of \$1 each all of which shall be issued by the Trustees to the said..... fully paid up for the property so transferred by them to the Trustees or intended so to be as aforesaid.

17. The holders of the preferred shares shall be entitled to dividends out of the income of the said trusts at the rate of 7 (seven) per cent per annum upon the nominal value of their shares from the date hereof during the continuance of the said trusts in priority to the holders of the common shares which dividends shall be cumulative until they shall have been declared and paid at the said rate for the whole of the said period and the preferred shares shall not entitle the holders thereof to any further dividends out of the income. And the Trustees upon declaring any dividend upon the preferred shares shall appropriate sufficient funds for the payment of such dividend and shall pay the same to the preferred shareholders at the time appointed.

18. The rest of the income not required for the said dividends upon the preferred shares shall be applicable by the Trustees to dividends upon the common shares. And the Trustees may declare such dividends upon the common shares out of the income at any time when a dividend or dividends shall have been declared on the preferred shares at the rate of 7 (seven) per cent down to that time and paid to holders thereof or provided for by the appropriation of sufficient funds for that purpose.

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19. Upon the termination of the said trusts the preferred shareholders shall be entitled to receive out of the proceeds of the trust premises the sum of \$100 (one hundred dollars) for each of the preferred shares together with any unpaid dividends to which they would be entitled if the said trusts had continued down to the completion of the sale of the trust premises or in case of the insufficiency of the said proceeds for such payments the same shall be apportioned ratably among the preferred shares. And any surplus of the said proceeds shall be apportioned among the holders of the common shares ratably according to the number of the said shares held by them respectively.

20. New shares in addition to those above mentioned may be issued by the Trustees with the sanction of a resolution of the holders of two thirds of all the shares.

21. Such new shares shall be of the same nominal value as the original preferred shares and may in accordance with any directions given by the Shareholders in any such resolution or if no such directions be given in the discretion of the Trustees be issued as preferred or common shares ranking *pari passu* with any of the preferred or common shares previously issued or with any right of preference as to dividend or capital or both or with any other special privilege or advantage or with any deferred rights as compared with any shares previously issued or then about to be issued.

22. All new shares may be issued either for money or property and if issued for money may be issued fully paid up upon the payment to the Trustees of such sum as they shall determine. And if any new shares are issued for the whole or any part of the price agreed upon for any property they may be issued fully paid up upon the transfer of such property to the Trustees.

23. Any new shares whether issued for money or property may be issued without offering the same to the existing Shareholders or any of them.

24. A register or registers shall be kept by or under the direction of the Trustees which shall contain the names and addresses of the Shareholders and the number of shares held by them respectively and of all future transfers thereof. No Shareholder shall be entitled to have any notice given to him as herein provided until he has given his address to the Trustees to be entered in the register.

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25. The Trustees shall have power to employ some incorporated trust company in the city of Boston as transfer agent or registrar to keep the said registers and to record therein the transfers of any of the said shares and to register certificates of shares issued by the Trustees to the persons entitled to the same after any transfers of such shares or otherwise. And the remuneration of such transfer agent or registrar shall be allowed as part of the expenses incidental to the execution of the said trusts.

26. Every Shareholder shall be entitled to receive from the Trustees a certificate signed by the president and the secretary or an assistant secretary substantially in one of the forms contained in the Second Schedule hereto specifying the number of shares held by him with such description if any as may be necessary to distinguish them from other shares to which different rights are attached and every certificate of shares shall be registered by the transfer agent or registrar if any and have on it a certificate of such transfer agent or registrar that it has been so registered.

27. If any certificate is worn out or defaced the Trustees may upon surrender thereof for cancellation issue a new certificate in place thereof. And on evidence satisfactory to the Trustees that any certificate has been lost or destroyed and on such terms if any as to indemnity and otherwise as they shall deem proper the Trustees may issue a new certificate in place thereof.

28. Every transfer of any share (otherwise than by operation of law) shall be in writing under the hand of the transferor and upon delivery thereof with the existing certificate for such share to the Trustees or their transfer agent shall be recorded in the register and a new certificate therefor shall be given to the transferee and in case of a transfer of only a part of the shares mentioned in any certificate a new certificate for the residue thereof shall be given to the transferor. Until the transfer shall be so delivered and recorded the transferor shall be deemed to be the holder of the share or shares comprised therein for all the purposes hereof and the Trustees shall not be affected by any notice of the transfer.

29. Any person becoming entitled to any share in consequence of the death bankruptcy or insolvency of any Shareholder or in any way other than by a transfer in accordance

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with the preceding paragraph shall be recorded in the register as the holder of the said share and receive a new certificate for the same upon production of the proper evidence thereof and delivery of the existing certificate to the Trustees or their transfer agent or registrar.

30. Shares shall be personal property entitling the Shareholders only to the rights and interests in the granted premises set forth in these presents.

31. Two or more persons holding any share shall be joint tenants of the entire interest therein and no entry shall be made in the register or in any certificate that any person is entitled to any future limited or contingent interest in any share. But any person registered as the holder of any share may subject to the provisions hereinafter contained be described therein as a trustee of any kind and any words may be added to the description to identify the trust.

32. The Trustees shall not nor shall the Shareholders or any transfer agent or registrar or other agent of the Trustees be bound to take notice or be affected by notice of any trust whether express implied or constructive or any charge or equity to which any of the said shares or the interests of any of the Shareholders in the trusts of these presents may be subject or to ascertain or inquire whether any sale or transfer of any such share or interest by any such Shareholder or his personal representatives is authorized by such trust charge or equity or to recognize any person as having any interest therein except the persons registered as such Shareholders. And the receipt of the person in whose name any share is registered or if such share is registered in the names of more than one person the receipt of any one of such persons shall be a sufficient discharge for all dividends and other moneys payable in respect of such share and from all liability to see to the application thereof.

SHARE WARRANTS

33. Upon the request in writing of the person registered as the holder of any shares and upon surrender and cancellation of the certificate for the same the Trustees shall issue a warrant (hereinafter called a share warrant) for the same number of shares substantially in the form contained in the Second Schedule hereto stating that the bearer is en-

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titled to the shares therein specified and may provide by coupons or otherwise for the payment of future dividends on such shares.

34. Coupons payable to bearer of such number as the Trustees shall think proper shall be attached to share warrants providing for the payment of dividends upon the shares included therein and the Trustees shall provide as they see fit for the issue of fresh coupons to the bearers for the time being of share warrants when the coupons attached thereto shall have been exhausted.

35. The surrender and cancellation of any certificate of shares shall be entered in the register and all share warrants issued and all coupons attached thereto or otherwise issued shall be registered by the transfer agent or registrar if any and every share warrant shall have on it a certificate of such agent or registrar that it has been so registered.

36. The coupons shall bear the number of the share warrant to which they belong and shall also be distinguished by numbers showing their place respectively in the series of coupons to which they belong but they shall not be expressed to be payable at any particular time and shall not contain any statement as to the amount which shall be payable.

37. When any dividend is declared upon the shares included in any share warrant the Trustees shall publish an advertisement in one daily newspaper published in Boston and in such other newspapers if any as they shall think proper stating the amount payable on each share and the time and place of payment and the serial number of the coupon to be presented. And any person presenting and delivering up a coupon of that number at the place specified in the coupon or in the advertisement shall be entitled to receive the dividend so declared upon the shares included in the share warrant to which the coupon belongs.

38. The Trustees shall be entitled to treat the bearer of any share warrant or coupon as absolutely entitled to the shares or dividend therein specified.

39. If any share warrant or coupon is worn out or defaced the Trustees may upon surrender thereof for cancellation issue a new one in its place. And on evidence satisfactory to the Trustees that any share warrant or coupon has been lost or destroyed and on such terms if any as to indemnity

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and otherwise as they shall deem proper the Trustees may issue a new one in place thereof.

40. A person shall not be entitled as the bearer of a share warrant to attend or vote or exercise any of the rights of a shareholder in respect thereof at a meeting of the Shareholders or to sign any request for any such meeting unless three days at least before the day of the meeting in the former case or unless before the delivery of the request in the latter case the share warrant shall have been deposited at the office where the register of the Shareholders is kept or such other place as the Trustees appoint with a statement in writing of his name and address and shall remain so deposited until after the meeting and for this purpose the name of only one holder of a share warrant shall be given or received.

41. The person so depositing any share warrant shall receive a certificate stating his name and address and the number of shares included in such share warrant and such certificate shall entitle him to attend and vote in person or by proxy and exercise the rights of a shareholder at a meeting in the same way as if he were a registered holder of the shares specified in such certificate. And upon the surrender of such certificate the share warrant in respect of which it shall have been given shall be returned.

42. Holders of share warrants shall not be entitled to notice of any meeting of the Shareholders.

43. A person shall not be entitled as bearer of a share warrant to exercise any of the rights of a member except as hereinbefore provided without producing such warrant and stating his name and address and if and when the Trustees so require permitting an indorsement to be made thereon of the fact date purpose and consequence of its production.

44. Subject to the provisions herein contained the bearer of a share warrant shall be deemed a Shareholder in respect of the shares specified in such warrant and shall have all the rights of a Shareholder in connection therewith.

45. The bearer of a share warrant upon surrendering it to be cancelled with a request in writing signed by him in such form as the Trustees require that he be registered as a Shareholder in respect of the shares included in such warrant and stating therein his name and address shall be entered in the register as a Shareholder accordingly.

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MEETINGS OF THE SHAREHOLDERS

46. An annual meeting of the Shareholders shall be held on the second Tuesday of February in every year after the present year at such time and place in the city of Boston as the Trustees shall appoint at which meeting the Trustees shall lay before the Shareholders an account of the receipts and expenditures and income account of the trusts hereof from the foot of the last previous account down to the end of the last financial year preceding such meeting and a report shall be laid before them by the Trustee whenever they think there is any matter of special interest or importance calling for such report.

47. At the annual meeting the accounts may be approved after such consideration as the Shareholders think proper and any other business may be considered or transacted that shall be specified in the notice of the meeting.

48. The Trustees may whenever they think fit and shall upon the written request of the holders of one quarter of all the said shares at the time outstanding call a special meeting of the Shareholders in the city of Boston. Every such request shall express the purpose of the meeting and shall be delivered to the Trustees or one of them addressed in the words "To the Trustees of the Blank Hotel Trust." And in case the Trustees shall refuse or neglect for seven days after the request shall have been so delivered to call such special meeting to be held within twenty-one days after the delivery of the request the same may be called by the person or persons signing such request or by any three of them. And a special meeting may also be called by the holders of one quarter of the said shares whenever the offices of the Trustees shall be entirely vacant.

49. The president of the Trustees shall be entitled to preside at every meeting of the Shareholders but if he is not present at the commencement of the meeting or being present shall not be willing to preside the Shareholders present shall choose any other shareholder to preside as chairman of such meeting.

50. At a special meeting no business or resolution shall be considered or passed other than such as is included in the purposes for which the meeting is called.

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51. Notices of the annual meetings and of special meetings shall be given in writing by the secretary or by order of the Trustees or in case of a special meeting by the persons calling the same to each of the Shareholders as hereinafter provided and if any share warrants have been issued by advertisement ten days at least before such meeting and shall specify the time and place thereof and in the case of a special meeting the purposes thereof.

52. At all meetings every Shareholder shall have one vote for every share held by him of the nominal value of \$100 (one hundred dollars) and fractional votes proportionately for shares held by him of a less nominal value and may vote either in person or by proxy appointed by writing under the hand of the appointer or in the case of a corporation under its seal and the holders of a majority in nominal value of all the shares shall constitute a quorum for the transaction of business.

53. For the purpose of determining the Shareholders who are entitled to vote at any meeting the Trustees may fix a day not more than twenty-one days before the day of such meeting and in such case only the Shareholders registered on such day shall be entitled to vote at such meeting on the shares included in such certificate.

54. When any share is held jointly by several persons any one of them may vote at any meeting in person or by proxy in respect of such share but if more than one of them shall be present at such meeting in person or by proxy no vote shall be received in respect of such share unless the persons so present join in or assent to such vote.

55. If the holder of any share is a minor or a person of unsound mind or subject to guardianship or to the legal control of any other person as regards the charge or management of such share he may vote by his guardian or such other person appointed or having such control and such vote may be given in person or by proxy.

56. If at the expiration of half an hour from the time appointed for a meeting a quorum is not present the meeting shall be dissolved if called at the request of Shareholders or by Shareholders after such request as hereinbefore provided but in other cases the Shareholders present in person or by proxy shall constitute a quorum for the purpose of adjourn-

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ing the meeting but not for the transaction of any other business.

57. Except as otherwise herein provided any resolution carried by majority of the votes given at any meeting shall be binding and in case of an equality of votes the chairman of the meeting shall have an additional or casting vote.

58. The Shareholders may by a resolution passed by the votes of the holders of three fourths of all the shares remove any Trustee or terminate these presents at an earlier time than that hereinbefore limited for that purpose or make any alteration in the terms powers and provisions herein contained but so that no such alteration shall affect the relative rights of the holders of the preferred and of the common shares though it may provide for the reduction of the number of the shares of any class and so that no alteration shall affect any purchaser or person dealing with the Trustees except so far as he shall have actual notice thereof or as it shall be set out in a certificate of the president and the secretary or assistant secretary recorded in the registry of deeds for the county of Suffolk.

59. Every notice to the Shareholders required or provided for in these presents may be given to them personally or by sending it to them through the post-office in a pre-paid letter addressed to each of them respectively at his address specified in the register and posted in the city of Boston and shall be deemed to have been given at the time when it is so posted. But in respect of any share held jointly by several persons notice so given to whichever of them is first named in the register shall be sufficient notice to all of them. And any notice so sent to the registered address of any shareholder shall be deemed to have been duly sent in respect of any such share whether held by him solely or jointly with others notwithstanding he be then deceased and whether the Trustees or any person sending such notice have knowledge or not of his death until some other person or persons shall be registered as holders. And the certificate of the person or persons giving such notice shall be sufficient evidence thereof and shall protect all persons acting in good faith in reliance on such certificate. Any notice herein required to be given by advertisement shall be given by publishing the same once in one daily news-

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paper published in Boston and in such other newspapers if any as the person or persons giving such notice shall think proper.

PROCEEDINGS OF THE TRUSTEES

60. The Trustees may meet together for the transaction of business and regulate their meetings as they think proper and they may prescribe the times and places of regular meetings of the Trustees which may be held without any further notice thereof. The Trustees may make alter and amend by-laws regulating their conduct and meetings and the management of the undertaking not inconsistent with the terms or provisions of these presents.

61. The quorum necessary for the transaction of business at a meeting of the Trustees shall be three Trustees present personally or by proxy of whom at least two shall be present personally. Such quorum shall have full power to exercise all or any of the powers authorities and discretions for the time being vested in the Trustees.

62. The president of two Trustees may at any time summon a special meeting of the Trustees by giving to each of the other Trustees three days' notice of such meeting and a notice thereof sent through the post-office in a prepaid letter addressed to any Trustee at his usual address and posted in the city of Boston on the fifth or any earlier day before such meeting shall be deemed sufficient notice to such Trustee whether the same shall be received by him or not and in computing any such time Sundays and holidays shall be included. But if any Trustee shall be out of Massachusetts New York Connecticut and Rhode Island it shall not be necessary to give him any notice of such meeting. And any Trustee may waive notice of a meeting either before or after such meeting.

63. A Trustee may from time to time in writing appoint another Trustee as his proxy to vote at any meeting of the Trustees.

64. Questions arising at any meeting of the Trustees shall be decided by a majority of the votes of the Trustees present personally or by proxy and in case of an equality of votes the chairman of the meeting shall have a second or casting vote.

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65. The Trustees from time to time shall elect a president a secretary and a treasurer who may or may not be elected from among the Trustees and shall have such authority and perform such duties as may from time to time be determined by the Trustees and any two or more of the said offices may be held by the same person.

66. The action of the Trustees in respect of any matter may be testified by a resolution passed by them at a meeting or by a writing signed by a majority of them.

67. A resolution in writing signed by a majority of the Trustees shall be as valid for all purposes as a resolution passed at a meeting of the Trustees.

68. A certificate signed by the president or secretary shall in favor of the Trustees and all other persons acting in good faith in reliance thereon be conclusive evidence of the contents of any resolution or action of the Trustees and of all matters in such certificate contained relating to the same or to the regularity thereof and the passage of such resolution or the taking of such action and no person shall be obliged to make any inquiry as to any of the said matters or as to the election or appointment of any person acting as a Trustee or be affected by actual or implied notice of any irregularity therein.

69. The Trustees shall cause to be kept in books provided for the purpose minutes of all resolutions and proceedings of the Trustees and of the names of the Trustees present at every meeting specifying whether they were present in person or by proxy and minutes of all resolutions and proceedings of all meetings of the Shareholders. And such minutes if purporting to be signed by the president or secretary or an assistant secretary shall be evidence of the matters therein stated and of the regularity of the meeting and that proper notice of the meeting was given if any was required in favor of the Trustees and all persons acting thereon in good faith of all such matters and things therein stated.

MISCELLANEOUS PROVISIONS

70. From and after the execution of these presents as to any and all of the real estate and other property specified

BLANK HOTEL TRUST

in the First Schedule hereto that may not have been effectually and perfectly vested in the Trustees as hereinbefore provided until the same shall have been so vested in them the said shall hold the same upon trust for transfer thereof to the Trustees in such manner as aforesaid and subject thereto shall hold the same upon the trusts herein contained concerning the same as if the same had been so transferred.

71. The trusts of these presents may be collectively designated for all the purposes thereof as the Blank Hotel Trust and under that name so far as practicable all business shall be conducted by the Trustees.

72. In the construction of these presents words in the singular number include the plural number and vice versa and words denoting males include females and words denoting persons include firms associations and corporations unless a contrary intention is to be inferred from the subject matter or context. And all the trusts powers and provisions herein contained shall take effect and be construed according to the law of Massachusetts.

73. The headings of different parts of these presents and the marginal notes are inserted for convenience of reference and are not to be taken to be any part of these presents or to control or affect the meaning construction or effect of the same.

74. The terms and provisions of these presents may be amended or changed in any manner or to any extent with the concurrence in writing or by vote at a meeting of the holders of three fourths in nominal value of all the shares then outstanding but not so as to affect the validity or effect of anything previously done by the Trustees or Shareholders hereunder.

In witness whereof the parties hereto have set their hands and seals at Boston in the State of Massachusetts the day and year first above written.

FIRST SCHEDULE

(omitted)

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SECOND SCHEDULE

(1) *Form of Certificate of Shares*

BLANK HOTEL TRUST

No. Shares.

This is to certify that is the holder of preferred (or common) shares full paid and non-assessable in the Blank Hotel Trust the said shares being issued received and held under and subject to the provisions of the indenture dated 1912 establishing the Blank Hotel Trust which is deposited with the Blank Trust Company in Boston

This certificate is not valid unless registered by the transfer agent and the shares specified herein are transferable by writing signed by the holder and registered in the books of the Blank Hotel Trust.

Witness the signatures of the president and the secretary or assistant secretary of the Blank Hotel Trust the

.....
President.

.....
Secretary.

Registered

BLANK TRUST COMPANY, *Transfer Agent.*

By
Assistant Secretary.

.....
Transfer Clerk.

Form of Transfer Indorsed on Certificate

For value received the undersigned the holder of the preferred (or common) shares in the Blank Hotel Trust specified in the within certificate hereby assigns and transfers unto of the said shares mentioned in the within certificate.

Dated 19....

Witness

Notice

Transfers will be registered and new certificates issued to the transferees upon the delivery of transfers to the transfer agent accompanied by this certificate. The signature on the transfer should correspond in every particular with the name of the holder as written in the certificate without enlargement or diminution or other change.

BLANK HOTEL TRUST

(2) *Form of Share Warrant*

BLANK HOTEL TRUST

No. Shares.

This is to certify that the bearer of this warrant is entitled to fully paid up preferred (or common) shares in the Blank Hotel Trust subject to the provisions of the indenture dated 1912 establishing the Blank Hotel Trust which is deposited with the Blank Trust Company in Boston.

This certificate is not valid unless registered by the transfer agent.

Witness the signatures of the president and the secretary or assistant secretary of the Blank Hotel Trust the

.....
President.

.....
Secretary.

Registered

BLANK TRUST COMPANY, *Transfer Agent.*

By.....
Assistant Secretary.

.....
Transfer Clerk.

Form of Coupon

BLANK HOTEL TRUST

Dividend coupon No.....

On preferred (or common) shares of Blank Hotel Trust included in the share warrant numbered as below payable at a time and place to be fixed by advertisement.

No.....

.....
Secretary.

APPENDIX OF FORMS

(3) *Form of Certificate of Deposit*

BLANK HOTEL TRUST

No.

This is to certify that has in accordance with the provisions of the indenture of trust by which the said undertaking was established deposited the undermentioned share warrants in respect of which he is entitled to attend the meeting of the shareholders of Blank Hotel Trust to be held on the.....

No. of share warrant shares represented coupons attached

Witness the signature of the secretary or assistant secretary of Blank Hotel Trust the

.....
Secretary.

Registered

BLANK TRUST COMPANY, *Transfer Agent.*

By
Assistant Secretary.

.....
Transfer Clerk.

Mortgage Bond

\$1000

No.

BLANK HOTEL TRUST

established by an indenture of trust dated the of
..... and deposited with the Blank Trust Company
at Boston.

Be it known that the Trustees of the Blank Hotel Trust above mentioned for value received promise to pay to the bearer hereof the sum of one thousand dollars out of the real and personal property for the time being subject to the trusts of the said indenture on the 1st day of 19... with interest at the rate of ... per cent per annum payable semi-annually to the bearers of the respective interest warrants therefor hereto annexed upon presentation thereof both principal and interest being payable at the office of the said Blank Trust Company. And so that the payment of the said principal and interest shall be a floating charge upon

BLANK HOTEL TRUST

the said property as provided in the said indenture and the said Trustees and the Shareholders in the said trusts or any of them shall not be personally liable for such payment.

This obligation is one of a series of bonds secured by a mortgage dated the day of 1912 whereby

This obligation is valid only when the Blank Trust Company has indorsed hereon its certificate that it is one of the bonds specified in the said mortgage.

In witness whereof the said Trustees have hereto set their seals using for that purpose the same seal and caused these presents to be signed by their president and treasurer the day of 1912.

.....
President.

.....
Treasurer.

(Interest Warrant)

(Certificate of the Blank Trust Co.)

I

NORTH AMERICAN COMPANIES

AGREEMENT AND DECLARATION OF TRUST

AGREEMENT made at Boston in the Commonwealth of Massachusetts and dated May fifth, 1915 by and between D., T. and C. parties of the first part, W. residing at B. Massachusetts and H. residing at S. Massachusetts (who and their successors are hereinafter collectively called the Trustees) parties of the second part and the Holders from time to time of Certificates for Preferred and Common Shares herein provided for (hereinafter called the Shareholders) parties of the third part.

Whereas the parties of the first part have entered into an agreement in writing (hereinafter called the Preliminary Agreement) dated May fourth, 1915 agreeing among other things respectively to sell, assign, transfer and deliver unto the Trustees the shares of stock by the terms hereof sold, assigned, transferred and delivered unto the Trustees upon receiving from the Trustees shares issued hereunder to the aggregate amount of 935300 Dollars in amount or par value of preferred shares and 558000 common shares without nominal or par value and upon the execution and delivery by the Trustees of the agreements therein referred to. Said Preliminary Agreement is on file with the Trustees and this agreement and declaration of trust is expressly made in pursuance thereof subject to all the terms thereof and the Shareholders hereby and by their acceptance of shares hereunder expressly assent to all the terms thereof.

NOW THEREFORE THIS AGREEMENT WITNESSETH

1. The said D. has sold, assigned, transferred and delivered and by these presents does sell, assign, transfer and deliver unto the Trustees and their successors and assigns 27853 shares of the common capital stock of the C. Company, a

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corporation organized and existing under the Laws of the Province of Quebec, Dominion of Canada, and agrees that he will sell, assign, transfer and deliver unto the Trustees any and all additional shares of the capital stock of the said company which may at any time hereafter be acquired by him upon receiving for each such additional share one preferred share issued hereunder and the Trustees agree to accept upon the said terms such additional shares as he may deliver to them up to the amount of stock in the C. Company now outstanding. The said T. has sold, assigned, transferred and delivered and by these presents does sell, assign, transfer and deliver unto the Trustees and their successors and assigns thirty-six thousand (36,000) shares of the capital stock of the S. Company, a corporation organized and existing under the laws of the State of New York. The said C. has sold, assigned, transferred and delivered and by these presents does sell, assign, transfer and deliver unto the Trustees and their successors and assigns (2500) shares of the preferred capital stock and (3000) shares of the common capital stock of T. Company, a corporation organized and existing under the laws of the State of New York, and agrees that he will sell, assign, transfer and deliver unto the Trustees all additional common and preferred shares of the capital stock of the said Company which may at any time hereafter be acquired by him upon receiving for each such additional share of preferred stock one preferred share issued hereunder and for each such additional share of common stock one common share issued hereunder and the Trustees agree to accept upon the said terms such additional shares as he may deliver to them up to the amount of stock in the T. Company now outstanding.

2. In consideration of the aforesaid assignments and agreements the Trustees (as Trustees and not individuals) will forthwith issue and deliver to the parties of the first part 935300 dollars in amount or par value of the preferred shares and 558000 of the common shares herein provided to be issued by them, and will forthwith execute and deliver a contract with S. Securities Corporation for the acquisition of four thousand (4000) additional shares of S. Company and will forthwith enter into an agreement for the sale to the Syndicate formed as set forth in the Preliminary Agreement of two hundred and twenty thousand (220,000) common

APPENDIX OF FORMS

shares to be issued hereunder, and forthwith execute and deliver an option agreement for the issue of two hundred and twenty thousand (220,000) additional common shares hereunder, all as provided for in the Preliminary Agreement.

3. The Trustees hereby declare and agree that they will hold all the said shares of stock acquired and to be acquired by them and all other property which they may acquire as such Trustees (hereinafter called the trust estate) IN TRUST, to hold and manage the same for the benefit of the shareholders for the time being according to the number and class of shares issued and held by them respectively and with and subject to the powers and provisions hereinafter set forth concerning the same.

THE TRUSTEES

4. The Trustees shall hold the legal title to the trust estate and in addition to the other rights, privileges, authority and power vested in them by law and hereby conferred upon them, they shall have power subject to the limitations and conditions of these presents;

(a) To manage and control the trust estate;

(b) To transfer and to sell, lease, dispose of or otherwise turn to account all or any part of the trust estate to any corporation, person or persons upon such terms as the Trustees may determine EXCEPT that the Trustee shall not except upon the termination of the trust hereby created in the manner hereinafter provided sell or dispose of any shares of the C. Company nor any shares of the S. Company nor any shares of the T. Company, nor any shares of any corporation of whose capital stock the greater part is or shall be held by the trustees without the assent by vote of the holders of a majority of the outstanding shares issued hereunder given at a regular annual meeting or at a special meeting called for the purpose of considering the sale or disposition of such shares;

(c) To acquire any real or personal property, rights, franchises or privileges which they may think suitable or convenient for any purposes of the undertaking;

(d) To vote in person or by proxy at any and all meetings general or special of stockholders or holders of other securities upon all shares of stock or other securities held hereunder

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and on any and all matters coming before said meetings, including the right to vote in favor of the creation of any mortgage lien or other encumbrance upon any of the property, real or personal, of any or all of the corporations any of whose shares of stock may at the time be comprised in the trust estate, and the right to vote in favor of consolidating or merging any of the corporations any of whose shares of stock may be comprised in the trust estate with any other such corporation or with any other corporation, and the right to vote in favor of the sale or lease of the physical property, real or personal, or any part thereof of any such corporation to any other corporation whatsoever now existing or hereafter created or to any voluntary association or trustees or persons having lawful power to acquire or to become lessees of such property, and the right to vote in favor of or to consent to any proposition, resolution or motion to amend, alter, repeal or modify any of the provisions of the articles of association, certificate of incorporation, charter and by-laws of any corporation any of whose shares of stock may be comprised in the trust estate, provided however that neither the right hereunder to vote in favor of the creation of any such mortgage lien or other encumbrance, nor the right to vote in favor of any such consolidating or merging, nor the right to vote in favor of any such sale or lease, nor the right to vote in favor of or to consent to any such proposition, resolution or motion to amend, alter, repeal or modify any of the provisions of the articles of association, certificate of incorporation, charter or by-laws of any corporation any of whose shares of stock may be comprised in the trust estate shall be exercised without the assent by vote of the holders of a majority of the outstanding shares issued hereunder given at a meeting of the shareholders and in case of any such consolidation, merger or sale to accept and receive in payment or in exchange for the interest of the trust estate in the premises howsoever represented the evidences of debt, bonds, notes, shares of stock, participation shares, trust certificates, certificates of interest or other security made or issued by one or more corporations, voluntary associations, trustees or persons as the Trustees may in their absolute and uncontrolled discretion deem to be proper;

(e) To transfer to any person or persons any share or shares of stock in any corporation that may at the time con-

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stitute a part of the trust estate, and to allow any such share or shares of stock to stand in the name or names of such persons as long as the Trustees shall think proper for the purpose of qualifying such person or persons as a director or directors or other officer of such corporation or otherwise for the purpose of maintaining the organization of such corporation, or for any other purpose deemed expedient by the Trustees;

(f) To cause any shares, bonds or securities at the time forming any part of the trust estate to be transferred into the names of or vested in the Trustees or any of them jointly with the right of survivorship or in any one of them in such manner as not to give notice that they are Trustees thereof or that the same are affected by any trust, or to allow or cause such shares, bonds or securities to remain in or to be transferred to the name or names of any other person, firm or corporation and to entrust to any bank or trust company or safe deposit company for safe keeping any or all of the certificates of stock, bonds, securities, claims and all documents and papers comprised in or relating to the trust estate;

(g) To sell or exchange subject to the limitations in (b) above on such terms and for such considerations whether cash or other securities as they may see fit, bonds, securities and other claims held by them of or against any corporation, for such bonds, notes, shares of stock, participation shares, trust certificates, certificates of interest or other securities made or issued by one or more corporations, voluntary associations, trustees or persons as the Trustees may in their absolute and uncontrolled discretion deem to be proper;

(h) To settle all accounts, and to compound, compromise, abandon or adjust by arbitration or otherwise any suits, actions, proceedings, disputes, claims, demands and things relating to the trust estate, and to transfer to and deposit with any incorporated trust company or other persons any shares or securities forming part of the trust estate for the purposes of any arrangement for enforcing or protecting the interests of the Trustees or the owners of such shares or securities and to give time with or without security for the payment or delivery of any debts or property claimed in favor of the trust estate, and to pay or satisfy any debts

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or claims upon any evidence that the Trustees may deem sufficient;

(i) To lend any money forming part of the trust estate from time to time on such terms and conditions and with or without security to any of the corporations of whose capital stock the greater part is or shall be held by the Trustees or to such persons or other corporations as the Trustees may approve, and to sell or otherwise dispose of and to pledge or hypothecate any bonds, notes or other evidences of indebtedness given for or on account of any such loans and to pay, liquidate, settle or discharge any debts, claims or demands of any sort now or hereafter existing against any corporation of whose capital stock the greater part is or shall be held by the Trustees;

(j) To invest or deal with the moneys forming part of the trust estate upon such securities or in such manner as they may from time to time determine in the same manner and to the same extent as if they were not Trustees but were making such investments as natural persons and without any limitation in respect of the character of the securities invested in, and to sell or otherwise dispose of any of such investments and reinvest the proceeds thereof, or any part thereof, with continuing power so to invest and reinvest during the existence of the trust hereby created;

(k) By unanimous action of the Trustees to raise or secure the payment of money from time to time for the purposes of the said trusts and to issue evidences thereof, and for such purpose to mortgage, pledge or otherwise encumber the whole or any part of the trust estate all upon such terms and conditions and for such purposes and in such manner as they may determine;

(l) To deposit any moneys, included in or derived from the trust estate, in any bank or trust company, and from time to time to provide for the disbursement thereof;

(m) To pay any and all taxes or liens of whatsoever nature or kind imposed upon or against the trust estate, or any part thereof, out of any funds available for such purpose;

(n) To buy or join with any person or persons in buying the property of any corporation, any of the securities of which are included in the trust estate, or any property in which the Trustees as such shall have or may hereafter ac-

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quire an interest and to allow the title to any property so bought to be taken in the name or names of and to be held by such person or persons as the Trustees shall name or approve and so that all real estate so acquired and in whatsoever name held shall be held upon trust for sale and conversion into personal estate at such time or times and in such manner and upon such terms as they shall think fit but all such real estate shall at all times during any postponement of the sale and conversion thereof, be considered as personal estate;

(o) To enter into any and all contracts, guaranties, obligations and other instruments which in the opinion of the Trustees may be necessary or expedient to carry out, promote, protect and conserve the trust hereby created and the interests of the shareholders, including the making of guaranties to secure the performance of contracts and obligations of other parties;

(p) Generally in all matters, to deal with the trust estate and to manage and conduct the affairs thereof as fully as if the Trustees were the absolute owners of the trust estate, and to execute and make and do all such agreements, deeds, instruments and things as the Trustees may deem proper for any of the said purposes;

(q) At any time and from time to time to vest in and delegate to an executive committee any powers and authorities conferred upon the Trustees by these presents and to alter, modify or revoke any such grant or delegation at discretion.

5. The Trustees shall not have any power or authority to borrow money on the credit or on behalf of the Shareholders or to make any contract on their behalf for repayment of any money raised by mortgage, pledge or charge in pursuance of the provisions hereof or to make any contract or incur any liability whatever on behalf of the Shareholders or binding them personally.

6. The management of the property and affairs of the trust estate may be carried on by the Trustees under the name of the North American Companies and the trusts hereby created and the Trustees in their collective capacity may also be designated as the North American Companies. In all written contracts and obligations it shall be the duty of the Trustees or other officers or agents especially to stipu-

NORTH AMERICAN COMPANIES

late that neither the Shareholders nor the Trustees nor any officers of the trust shall be held to any personal liability under or by reason of the same.

7. The Trustees may appoint a President, one or more Vice-Presidents, a Secretary, a Treasurer and such other officers and agents as they shall think proper for the management of the property and affairs of the trust estate and assign to them from time to time such duties as they shall think fit without being answerable for the acts or defaults of such officers or agents. The Trustees may delegate any of their powers to an executive committee but such committee shall in the exercise of any power so delegated conform to any regulations that may from time to time be imposed by the Trustees. None of the said officers or agents or members of the executive committee need be Trustees. The Trustees may fix and pay out of the trust estate the compensation of the officers, agents and members of the executive committee appointed by them and if any Trustee shall act as an officer, agent or member of the executive committee he may receive compensation for so acting in addition to that received by him as Trustee.

8. The Trustees may act with or without a meeting and the action of a majority of the Trustees except as provided in (k) above shall be valid and binding. Any Trustee may appoint any other Trustee as his proxy to act for him at any meeting and may empower any other Trustee to act on his behalf and to use his name for execution or signature of documents for the purposes of these presents without being responsible for loss.

9. Out of the income from the trust estate the Trustees may make distributions under the name of dividends or otherwise among the Shareholders as hereinafter provided at such times as the Trustees may fix, and the Shareholders shall have no right to any distributions except when and as declared by the Trustees.

10. The Trustees shall be entitled to remuneration the amount of which shall from time to time be fixed by vote of the Shareholders, and shall be paid out of the trust estate.

11. The Trustees shall pay out of the trust estate the expenses of the preparation of this agreement and the forma-

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tion of the trust hereby created and the agreements pursuant to which this agreement and declaration of trust is executed as referred to herein and of printing and engraving or lithographing the certificates for shares to be issued hereunder and other expenses of like nature in connection with the formation of the trust hereby created.

12. Every Trustee may purchase or acquire shares in all respects as if he were not a Trustee. No Trustee shall be disqualified by his office from contracting with the Trustees either as vendor, purchaser or otherwise, nor shall any such contract or arrangement in which any Trustee shall be in any way interested be avoided, nor shall any Trustee so contracting or being so interested be liable to account for the profit realized by any such contract or arrangement by reason of such Trustee holding office or of the fiduciary relation thereby established, but the nature of his interest must be disclosed by him to the other Trustees before the contract or arrangement is determined on if his interest then exists and no Trustee shall vote in respect of any contract or arrangement in which he is interested as aforesaid but this prohibition shall not apply to any resolution to give the Trustees or any of them any remuneration or security by way of indemnity and it may at any time or times be suspended or relaxed to any extent by vote of the Shareholders.

13. Except in the case of death, resignation or disability the Trustees to whom the trust estate is granted by these presents shall continue to be Trustees hereof until the first annual meeting of the Shareholders at which time an equal number of Trustees or in the event that such number shall have been increased by the Trustees or shall be increased by the Shareholders then such increased number shall be elected by the Shareholders. The Trustees may at any time and from time to time until the first annual meeting of the Shareholders increase the number of Trustees hereunder but not to a number exceeding nine (9) and may fill any vacancy caused by such increase and the Shareholders may at any annual meeting fix the number of Trustees hereunder but such number shall not be less than three (3) and shall not exceed nine (9). The Trustees elected at any annual meeting shall hold office until the next annual meeting thereafter and until their successors have been elected and have agreed to act. Failure to hold an annual meeting or elect

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Trustees shall not cause any vacancy among the Trustees or in any way affect the trust hereby created. The Trustees shall have power at any time or times to accept the resignation of any Trustee and fill any vacancy caused by resignation or otherwise.

14. Any Trustee may retire by presenting his resignation in writing to some one or more of the Trustees but such resignation shall be effectual and complete only upon the appointment of a new Trustee in his place or the previous acceptance of his resignation by the remaining Trustees or upon the expiration of six calendar months after such resignation and meanwhile he shall continue to act as such Trustee.

15. Upon the resignation of any Trustee and upon every appointment of a new Trustee such instruments shall be executed as shall be necessary or convenient for vesting the trust estate in the Trustees for the time being or providing evidence of such vesting independently of such resignation or appointment, all of which instruments the Trustees for the time being are hereby authorized to execute. The Trustees for the time being may exercise all the powers, authorities and discretions hereby given to the Trustees notwithstanding any vacancy among the Trustees.

16. The receipts of the Trustees or either of them or any of them or of the Treasurer or other officer or agent thereunto authorized by the Trustees for money or things paid or delivered to them or him shall be an effectual discharge to the persons paying or delivering the same therefrom and from all liability to see to the application thereof. No purchaser or person dealing with the Trustees shall be bound to ascertain or inquire as to the existence or occurrence of any event or purpose in or for which a sale, mortgage, pledge or charge is herein authorized or directed, or otherwise as to the purpose or regularity of any of the acts of the Trustees purporting to be done in pursuance of any of the provisions or powers herein contained or as to the regularity of the discharge, resignation or appointment of any Trustee; and a transfer of the trust premises or any part thereof executed by the Trustee or Trustees in whom the same shall be vested at the time of any such discharge,

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resignation or appointment for the purpose of vesting the same in the Trustees for the time being of these presents or providing evidence of such vesting independently of such discharge, resignation or appointment, shall as to the property comprised in such transfer be conclusive evidence in favor of any such purchaser or other person dealing with the Trustees as to the matters therein recited relating to such discharge, resignation or appointment or the occasion thereof or the occasion of such transfer. No purchaser or person dealing with any Trustee purporting to act during the absence of any other Trustee or under any delegation of authority from any other Trustee shall be concerned to ascertain or inquire whether an occasion exists in which he is authorized so to act or in which such delegation is permitted or whether such delegated authority is still subsisting.

17. No corporation, company or body politic shall be affected by notice that any of its shares or bonds or other securities are subject to these presents or be bound to see to the execution of any of the trusts hereunder or to ascertain or inquire whether any transfer of any such shares, bonds or securities by the Trustees is authorized notwithstanding such authority may be disputed by some other person.

18. No Trustee or member of any committee appointed by the Trustees shall be liable for anything done or omitted by him in good faith and each shall be answerable and accountable only for his own acts, receipts, neglects and defaults respectively and not for those of any other nor of any agent employed by them nor of any bank, trust company, broker or other person with whom or into whose hands any part of the trust estate may be deposited or come, nor for any defect in title or lack of genuineness or invalidity of the shares of stocks, bonds, notes, obligations or other properties or securities at any time included in the trust estate, nor for any loss, unless it shall happen through his or its own wilful default respectively. No Trustee however appointed shall be obliged to give any bond or surety or other security for the performance of any of his duties in the said trust.

19. Each Trustee and each member of any committee appointed by the Trustees and each officer, agent and other

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representative appointed pursuant to any provision hereof shall be entitled to indemnity out of the trust estate against any and all loss and liability incurred by him or them or any of them in the execution of the trust hereby created. But the Trustees or any of them or any member of any committee or officer, agent or representative appointed hereunder shall not be entitled to look to the Shareholders personally for indemnity against any loss or liability incurred by him or them or any of them in the execution hereof or to call upon the Shareholders for the payment of any sum of money or any assessment whatever.

20: In case the Trustees shall acquire any interest in real estate as proceeds or income of the trust estate they shall hold the same upon trust for sale and conversion into personal estate at such time or times and in such manner and upon such terms as they shall approve and they shall have the power to postpone such conversion so long as they in their uncontrolled discretion shall think fit but all such real estate shall at all times during any postponement of the sale and conversion thereof be considered as personal estate subject to the terms hereof and at all times and to the full extent permitted by law all such real estate shall be considered and treated as personal property for the purposes of the trust hereby created.

SHARES AND SHAREHOLDERS

21. The beneficial interest in the trust estate shall be divided into twenty thousand (20,000) preferred shares expressed to be of the amount or par value of one hundred dollars (\$100) each and one million (1,000,000) common shares without expressed amount or par value. All such shares shall be personal property, shall be assignable and transferable in the manner herein provided and shall entitle the holders thereof only to such rights and interests in the trust estate as are set forth in these presents.

22. The said twenty thousand (20,000) preferred shares of the amount or par value of two million dollars (\$2,000,000) and five hundred and sixty thousand (560,000) of the common shares shall be reserved to be issued by the Trustees only for the acquisition by them of shares of stock in

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the C. Company, the S. Company and the T. Company. In the first instance the Trustees shall issue for the purposes set forth in this subdivision 22 hereof certificates for the amount or par value of 935300 dollars preferred shares and 558000 common shares, and shall deliver the said shares to or upon the order of the parties of the first part hereto. From time to time the Trustees shall deliver for each additional share of the common capital stock of the said C. Company received by the Trustees one of the preferred shares issued hereunder and shall deliver for each additional share of the preferred stock of the T. Company received by the Trustees, one of the preferred shares issued hereunder, and for each additional share of the common stock of the T. Company received by the Trustees, one of the common shares issued hereunder but the total amount of the shares issued hereunder for the purposes set forth in this subdivision 22 hereof shall not exceed twenty thousand (20,000) preferred shares and five hundred and sixty thousand (560,000) common shares.

23. The Trustees shall from time to time when and as requested by the Syndicate Managers of the Syndicate referred to in the Preliminary Agreement deliver to or upon the order of said Syndicate Managers certificates for common shares issued hereunder up to but not exceeding two hundred and twenty thousand (220,000) shares, upon receiving from the Syndicate Managers the sum of seven dollars and twenty-seven cents (\$7.27) less any discount allowed as hereinafter provided for each share so issued; provided however that any of said two hundred and twenty thousand (220,000) shares which shall not have been taken at the above rate by the said Syndicate may be issued by the Trustees in accordance with the provisions of subdivision 23 hereof.

24. The Trustees shall from time to time issue and deliver common shares hereunder according to the terms of the option agreement referred to in the Preliminary Agreement, up to but not exceeding two hundred and twenty thousand (220,000) shares, upon receiving the sum of seven dollars and twenty-seven cents (\$7.27) less any discount allowed as hereinafter provided for each share so issued; provided however that any of the two hundred and twenty thousand (220,000) common

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shares last above mentioned may if not taken and paid for as provided by said option agreement be issued by the Trustees in accordance with the provisions of subdivision 25 hereof.

25. Any of the shares not taken as provided in subdivisions 23 and 24 hereof may be issued by the Trustees either for money or for property or in payment of liabilities or obligations of the Trustees, and if issued for money may be issued fully paid up upon the payment to the Trustees of such sum as they shall determine and if issued for the whole or any part of the price agreed upon for any property they may be issued fully paid up upon the transfer of such property to the Trustees. All such shares may be issued without offering the same to existing Shareholders or any of them.

26. The Trustees may accept or agree to accept payment for any of the shares issued by them under subdivisions 23 or 24 or 25 hereof in instalments and may allow or agree to allow such discount as they may determine in respect of any instalment or instalments paid in advance.

27. The relative rights and interests and the preferences and limitations of the holders of the preferred shares and of the common shares shall be as follows:

The preferred shares shall entitle the holders to receive when and as declared by the Trustees dividends at the rate of six dollars (\$6.00) per annum and no more for and on account of each such share. Such dividends shall be cumulative from April 1st, 1917 and the moneys therefor shall be set apart before any dividends shall be paid or set apart for the common shares so that if in any year beginning with April 1st, 1917 dividends at the said rate shall not have been declared upon the preferred shares and set apart therefor the accumulated and unpaid dividends thereon shall be set apart or provided for before any dividends shall be paid upon or set apart for the common shares.

28. Whenever in any year all such dividends shall have been declared on the preferred shares and set apart and after April 1st, 1917 all such cumulative dividends shall have been declared on the preferred shares and set apart any money applicable by the Trustees for the payment of

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dividends then remaining in their hands or under their control may to the extent that the Trustees shall see fit be distributed and paid as a dividend ratably among and to the holders of common shares but before declaring any dividends either upon the preferred or common shares the Trustees may in their uncontrolled discretion and to the extent the Trustees may see fit set aside sums for reserve or other purposes of the trust.

29. In any distribution by the Trustees of the trust estate upon the termination of the trust each preferred share shall entitle the holder thereof to receive out of the trust estate available for distribution to the Shareholders the sum of one hundred dollars (\$100) or its equivalent and also a sum equal to six per cent. per annum upon the amount of such share for the period from April 1st, 1917 to the date of distribution less the amount of any dividends paid thereon during such period before any amount shall be paid to the holders of the common shares. After such amounts shall have been paid in full to or set apart for the holders of the preferred shares the remainder of the trust estate available for distribution shall be distributed ratably among and to the holders of the common shares.

30. The preferred shares as a whole may be redeemed at the option of the Trustees on any date after April 1st, 1917 fixed for the payment of a dividend thereon and the preferred shares may be redeemed from time to time in portions at the option of the Trustees at any date or dates fixed for a dividend thereon upon the payment of the one hundred and three dollars (\$103) for each such share and all unpaid dividends accumulated to the date for redemption and upon notice published in a newspaper of general circulation in the City of New York, a newspaper of general circulation in the City of Philadelphia, a newspaper of general circulation in the City of Boston and a newspaper of general circulation in the City of Montreal once a week for four successive weeks immediately preceding the date of redemption specified in such notice and if less than all of the preferred shares shall be called for redemption a similar notice shall also be mailed to each of the persons in whose name certificates for preferred shares to be redeemed shall be registered stating also the number of shares called to be

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redeemed out of the total number standing in the name of the person to whom such notice is mailed.

31. On or prior to the date fixed for such redemption the Trustees shall deposit at such office or agency as shall be designated in such notice of redemption an amount of cash equal to one hundred and three dollars (\$103) for each share to be redeemed and the amount of unpaid dividends accumulated thereon to such date of redemption so fixed. In case notice of redemption shall have been published as aforesaid and said sum of money shall be so deposited at the office designated in said notice, dividends on the shares so called for redemption from and after said date of redemption shall cease and from and after said date the holders of said preferred shares shall have no further right or interest thereunder or in any part of the trust estate except to receive payment for said shares out of the funds so deposited by the Trustees at the rate above provided upon presentation and surrender of their respective certificates at the office designated in said notice. If the Trustees shall not on or prior to the date of redemption deposit a sum of money sufficient to pay all such shares in the manner above stated dividends shall continue to accumulate on said shares. If at any time the Trustees shall determine to call for redemption a portion of all the outstanding preferred shares they shall assign a number to every outstanding preferred share and shall draw by lot the shares to be redeemed.

32. The Trustees may in their uncontrolled discretion at any time and from time to time, apply any of the income from the trust estate to the redemption of preferred shares by purchasing the same in the open market for such price as they shall determine not to exceed one hundred and three dollars (\$103) for each share and all unpaid dividends accumulated to the date of the purchase.

33. As evidence of the ownership of said preferred and common shares the Trustees shall cause to be issued transferable certificates each of which certificates and the form for the transfer thereof shall be substantially in the following forms respectively except that the Trustees are hereby authorized to modify the same from time to time in any manner not inconsistent with the terms and conditions hereof.

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Face of Certificate for Preferred Shares

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No. Shares.

This certifies that is the holder of preferred shares fully paid and non-assessable of the amount or par value of \$100 each in the Trust called North American Companies established by an Agreement and Declaration of Trust dated May 5th, 1915 between D., T. and C. parties of the first part and W. and H. as Trustees parties of the second part and the holders of the shares issued thereunder parties of the third part. The said shares are issued, received and held subject to the provisions set forth on the back of this Certificate which are expressly made a part hereof and to which reference is hereby expressly directed. The shares represented by this Certificate are transferable only by the holder in person or by attorney on the books of the Trustees under the said Agreement and Declaration of Trust upon surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF the Trustees under the said Agreement and Declaration of Trust have signed this Certificate this day of 19..

.
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*As Trustees under the Agreement and
Declaration of Trust dated May 5th,
1915 establishing the Trust therein
called North American Companies
and not individually.*

NORTH AMERICAN COMPANIES

Face of Certificate for Common Shares

NORTH AMERICAN COMPANIES

No. Shares.

This certifies that is the holder ofcommon shares fully paid and non-assessable without expressed amount or par value in the Trust called North American Companies established by an Agreement and Declaration of Trust dated May 5th, 1915 between D., T. and C. parties of the first part and W. and H. as Trustees parties of the second part and the holders of the shares issued thereunder parties of the third part. The said shares are issued, received and held subject to the provisions set forth on the back of this Certificate which are expressly made a part hereof and to which reference is hereby expressly directed. The shares represented by this Certificate are transferable only by the holder in person or by attorney on the books of the Trustees under the said Agreement and Declaration of Trust upon surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF the Trustees under the said Agreement and Declaration of Trust have signed this Certificate this day of 19..

.....
.....
As Trustees under the Agreement and Declaration of Trust dated May 5th, 1915 establishing the Trust therein called North American Companies and not individually.

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Back of Certificates for both Preferred and Common Shares

Provisions referred to on the face of this Certificate:

1. The Agreement and Declaration of Trust (hereinafter called the Trust Agreement) referred to on the face of this Certificate provides that the beneficial interest in the trust estate thereby established shall be divided into 20,000 preferred shares expressed to be of the amount or par value of \$100 each and 1,000,000 common shares without expressed amount or par value and provides for the issue of the said shares by the Trustees thereunder.

2. As and to the extent provided in the Trust Agreement

(a) The shares are of two classes, to wit, preferred and common.

(b) The holders of the preferred shares are entitled to receive when and as declared by the Trustees dividends at the rate of six dollars (\$6.00) per annum and no more for and on account of each such share. Such dividends are cumulative from April 1st, 1917 and the moneys therefor shall be set apart before any dividends shall be paid or set apart for the common shares so that if in any year beginning with April 1st, 1917 dividends at the same rate shall not have been declared upon the preferred shares and set apart therefor the accumulated and unpaid dividends thereon shall be set apart or provided for before any dividends shall be paid upon or set apart for the common shares.

(c) Whenever in any year all such dividends shall have been declared on the preferred shares and set apart and after April 1st, 1917 all such cumulative dividends shall have been declared on the preferred shares and set apart any money applicable by the Trustees for the payment of dividends then remaining in their hands or under their control may to the extent that said Trustees shall see fit be distributed and paid as a dividend ratably among and to the holders of the common shares but before declaring any dividends either upon the preferred or common shares the Trustees may in their uncontrolled discretion and to the extent the Trustees may see fit set aside sums for reserve or other purposes of the trust.

(d) In any distribution by the Trustees of the trust es-

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tate upon the termination of the trust each preferred share shall entitle the holder thereof to receive out of the trust estate available for distribution to the Shareholders the sum of one hundred dollars (\$100) or its equivalent and also a sum equal to six per cent. per annum upon the amount of such share for the period from April 1st, 1917 to the date of distribution less the amount of any dividends paid thereon during such period before any amount shall be paid to the holders of the common shares. After such amounts shall have been paid in full to or set apart for the holders of the preferred shares the remainder of the trust estate available for distribution shall be distributed ratably among and to the holders of the common shares.

(e) The preferred shares as a whole may be redeemed at the option of the Trustees on any date after April 1st, 1917 fixed for the payment of a dividend thereon and the preferred shares may be redeemed from time to time in portions at the option of the Trustees at any date or dates fixed for a dividend thereon upon the payment of one hundred and three dollars (\$103) for each such share and all unpaid dividends accumulated to the date for redemption upon notice published in a newspaper of general circulation in the City of New York, a newspaper of general circulation in the City of Philadelphia, a newspaper of general circulation in the City of Boston and a newspaper of general circulation in the City of Montreal once a week for four successive weeks immediately preceding the date of redemption specified in such notice, and if less than all of the preferred shares shall be called for redemption a similar notice shall also be mailed to each of the persons in whose names certificates for preferred shares to be redeemed shall be registered stating also the number of shares called to be redeemed out of the total number standing in the name of the person to whom such notice is mailed. In case notice of redemption shall have been published as aforesaid and the amount to be paid upon the shares at redemption shall have been deposited at an office or agency of the Trustees at or before the date for redemption, dividends on the shares called for redemption from and after said date shall cease and from and after said date the holders of said preferred shares shall have no further right or interest thereunder or in any part of the trust estate except to receive payment for said shares out of the

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funds so deposited by the Trustees at the rate aforesaid upon presentation and surrender of their respective certificates at the office designated in said notice.

3. All the provisions of the Trust Agreement are hereby made a part hereof as if the same were herein set forth at length and reference is hereby also made to the Preliminary Agreement therein mentioned among the parties of the first part to the Trust Agreement in pursuance of which Preliminary Agreement and subject to the terms of which the Trust Agreement is made and all the said shares are issued, received and held subject and the holder hereof hereby expressly assents to all the provisions of the Trust Agreement and the Preliminary agreement. An original of the Trust Agreement and of the Preliminary Agreement are lodged with the Trustees at their office and are open to the inspection of any Shareholder during business hours.

4. The within Certificate is made by the Trustees not individually but as Trustees under the Trust Agreement and any and all personal liability of the parties of the first part named in the Trust Agreement and of the Trustees, executive committee and the Shareholders thereunder is by the acceptance and as a consideration for the issue and execution hereof expressly waived by the holder hereof.

For value received hereby sell, assign and transfer unto.....

.....
of the shares represented by the within Certificate and do hereby irrevocably constitute and appoint

Attorney to transfer the said shares on the books of the Trustees under the within mentioned Agreement and Declaration of Trust with full power of substitution in the premises.

Dated, 19..

In presence of

NOTICE. The signature to this assignment must correspond with the name as written upon the face of the Certificate in every particular without alteration or enlargement or any change whatever.

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34. An original of this Trust Agreement and of the Preliminary Agreement herein referred to shall be lodged with the Trustees and kept at their office and shall be open to the inspection of any Shareholder during business hours.

35. No certificate shall be issued for less than one share of either class. Certificates may be signed by the Trustees or by any agent thereunto authorized by them. In case any of the Trustees in whose name and in whose behalf any of said certificates shall have been signed shall cease to act in such capacity before the certificate so signed shall have been issued, such certificate may, nevertheless, be issued as if the persons in whose name and in whose behalf such certificates were signed had not ceased to be such Trustees.

36. The Trustees shall keep or cause to be kept at an office or agency in the City of Boston or in the City of New York or in the City of Philadelphia or in the City of Montreal, or in either of said cities, transfer books in which shall be registered the names of the holders of the certificates together with the post office address of each, as given by him for such purpose. The Trustees may appoint a Transfer Agent to keep such books and may require that all certificates before issue shall be countersigned by such Transfer Agent and that no such certificates shall be or become valid for any purpose until so countersigned. The Trustees may also appoint a Registrar and may require that all certificates for shares issued hereunder shall be countersigned by such Registrar and that no such certificates shall be or become valid for any purpose until so countersigned. Shares shall only be transferable on said books upon the execution of a transfer substantially in the form endorsed on said certificates and on surrender of the certificate by the registered holder in person or by attorney and in accordance and compliance with such rules and regulations as from time to time the Trustees may establish. The Trustees, any Transfer Agent or Registrar appointed by them, Executive Committee, and all other persons may deem and treat the person in whose name any certificate shall be registered upon the books kept as above provided as the absolute owner of the share or shares represented by such certificate for the purpose of receiving any dividend or other payments on or in respect thereof, for the purpose of voting and acting in respect thereof and for all other purposes, and none of them shall

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be affected by any notice to the contrary. Such transfer books may be closed by the Trustee at and during any period prior to the date of payment of any dividend or the distribution of any part of the Trust Estate upon the shares, or prior to the date of any meeting of Shareholders. The Trustees may also close such transfer books for such other reason and for such period as they may deem advisable.

37. Until permanent certificates can be prepared the Trustees may issue and deliver in lieu thereof and subject to the same provisions, limitations and conditions, temporary typewritten, printed or lithographed certificates substantially of the purport of the certificates heretofore recited. Such temporary certificates shall be countersigned by the Transfer Agent or by the Registrar in the manner above provided if any such Transfer Agent or Registrar or both shall have been appointed by the Trustees in like manner as herein provided with respect to the permanent certificates. Such temporary certificates shall be exchangeable at an office of the Trustees for permanent certificates without expense to the holder, and until such exchange the said temporary certificates shall be transferable in the same manner as permanent certificates and shall entitle the holder to the same rights as permanent certificates.

38. In case of the mutilation, loss or destruction of any certificate, the Trustees may on evidence satisfactory to them that it has been so mutilated, lost or destroyed and upon such terms as to indemnity and otherwise as may be prescribed by them, issue a new certificate or certificates in the place of the certificate mutilated, lost or destroyed.

39. Every transfer (otherwise than by operation of law) of any share and the interest represented thereby shall be in writing by the owner and registered holder, and upon delivery thereof with the existing certificate for such share to the Trustees or their Transfer Agent shall be recorded on the transfer books and a new certificate shall be given to the transferee. In case of a transfer of only a part of the shares in any certificate, a new certificate for the residue thereof shall be given to the transferor. Until the transfer shall be so delivered and recorded the transferor shall be deemed to be the holder of the share or shares comprised therein for all the purposes of the trusts hereof, and neither the Trustees

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nor their Transfer Agent shall be affected by any notice of any unrecorded transfer or otherwise to the contrary.

40. Any person becoming entitled to any share in consequence of the death, bankruptcy or insolvency of any Shareholder in any way other than by a transfer in accordance with the subdivision 39 hereof, upon the production of such evidence of his title as may be prescribed by the Trustees and upon surrender of the said certificate to the Trustees or one of their Transfer Agents, shall be registered in the transfer books as the holder of the said shares and receive new certificates for the same.

41. Two or more persons holding any share shall be joint tenants of the entire interest therein and no entry shall be made on any certificate or in the 'Trustees' books that any person is entitled to any future, limited or contingent interest in any share. But any person registered as the holder of any share may, subject to the provisions hereinafter contained, be described therein as a Trustee of any kind, and any words may be added to the description to identify the trust.

42. The Trustees shall not, nor shall the Committee or Shareholders or any Transfer Agent or other agent of the Trustees or Committee, be bound to take notice or be affected by notice of any trust, whether express, implied or constructive, or any charge or equity to which any of the said shares or the interest of any of the Shareholders in the trusts in these presents may be subject or to ascertain or inquire whether any sale or transfer of any such share or interest by any such Shareholder or his personal representatives is authorized by such trust, charge or equity, or to recognize any person as having any interest therein except the persons registered as such Shareholders, and the receipt of the person in whose name any share is registered or if such share is registered in the names of more than one person the receipt of one of said persons shall be a sufficient discharge for all dividends and other money payable in respect of said shares and from all liability to see to the application thereof.

43. Unless specific notice to the contrary shall have been given in writing to the Trustees or their Transfer Agent, they may deem and treat any person presenting a share certificate together with the transfer thereof purporting to

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be signed by the registered holder of such certificate as the *bona fide* and sole owner thereof and accordingly on demand they may transfer the shares thereby represented.

MEETINGS OF THE SHAREHOLDERS

44. An Annual Meeting of the Shareholders for the election of Trustees and the transaction of such other business as may be brought before the meeting shall be held at the office of the Trustees or such other place as may be determined by the Trustees on the second Tuesday of May in each year at twelve o'clock noon, beginning with the year 1916. At every such meeting the Trustees shall lay before the Shareholders an account of the receipts and expenditures and income account of the trust estate for the year ending on the 31st day of December next preceding such meeting. The Trustees and any Shareholder may also submit at any such meeting any report, resolution or proposition concerning which action by the Shareholders is desired. At each annual meeting the whole number of Trustees, as fixed by this agreement and declaration of trust, or as increased or decreased under the provisions hereof shall be elected by the Shareholders and any business brought before the meeting may be considered or transacted.

45. Neglect or failure to hold such annual meeting shall not cause any vacancy among the Trustees and the persons acting as Trustees shall continue to act until the holding of such meeting.

46. The Trustees may at any time call a special meeting of the Shareholders to be held at such place as the Trustees may determine. At a special meeting no business shall be transacted other than such as is included in the purposes for which the meeting is called.

47. The Chairman of the Executive Committee shall preside at every meeting of the Shareholders but if he is not present at the commencement of the meeting or being present shall not be willing to preside or shall not be acceptable for such purpose to the Shareholders present they may choose another person to preside.

48. Written or printed notice of the annual meeting and of special meetings of the Shareholders shall be given seven days at least before any such meeting on behalf of the Trus-

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tees to each of the Shareholders by such person as the Trustees may designate as their Secretary and in such manner as the Trustees may prescribe or approve, and such notice shall specify the time and place of the meeting, and in the case of a special meeting, shall state the purposes thereof. The Shareholders may waive in writing the notice required for annual and special meetings of Shareholders. No failure to give notice and no irregularity in notice of the annual meeting or in the mailing thereof shall affect the validity of such meeting or of any proceedings thereof.

49. At all meetings every Shareholder shall have one vote for every share standing in his name on the books of the Trustees whether preferred or common and may vote in person or by proxy appointed by him in writing or in the case of a corporation appointed by it in writing under its corporate seal. The holders of a majority of all the shares issued and outstanding shall constitute a quorum for the transaction of business, but the holders of a less amount may from time to time adjourn the meeting to a time fixed by them without further notice to the Shareholders of the time so fixed for the holding of such adjourned meeting.

50. If the holder of any share be a minor or a person of unsound mind or subject to the legal control of any other person as regards the control or management of such share, he may vote by his guardian, tutor, committee, curator or other person having such control, and such vote may be given in person or by proxy. When any share is held jointly by several persons any one of them may vote at any meeting in person or by proxy in respect of such share but if more than one of them shall be present at such meeting in person or by proxy no vote shall be received in respect of such share unless all such persons so present join in or assent to such vote.

51. For the purpose of determining the Shareholders entitled to vote at any meeting the Trustees may close the transfer books at the end of such day as they may direct and the same shall remain closed until the end of the meeting and no person shall be entitled to vote at such meeting whose name is not entered on the transfer books prior to the closing thereof.

52. Except as otherwise herein provided a majority of the votes given at any meeting shall constitute the action of the

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meeting and in case of an equality in number of votes the Chairman of the meeting shall have an additional vote.

53. At any time the Shareholders may consent to the termination by the Trustees of the trust hereby created at an earlier date or different time than elsewhere in this agreement limited or prescribed and may consent to any amendment change or addition to these presents or to any of the terms and provisions hereof which shall have been adopted by the Trustees. Any such consent may be given without a meeting of the Shareholders by writing signed by the holders of at least two-thirds in number of all the shares at the time outstanding or at a meeting of the Shareholders by resolution adopted by the affirmative votes of the holders of at least two-thirds in number of all the shares at the time outstanding. No such action shall however be taken at a meeting of the Shareholders either annual or special unless the proposed action shall have been referred to in the notice of the meeting.

54. Every notice to the Shareholders required or provided for in these presents may be given to them personally or by sending it to them through the post office in a postage prepaid letter addressed to each of them respectively at his address as the same appears on the records of the Trustees and posted in the City of Boston or the City of New York or the City of Philadelphia or the City of Montreal and shall be deemed to have been given at the time when it is so posted. Any notice so sent to the registered address of any Shareholder shall be deemed to have been duly sent in respect of any such share notwithstanding such Shareholder be then deceased and whether the Trustees or the members of the Committee or any person sending the notice shall have knowledge or not of his death until some other person shall be registered as a holder. The certificate of the person or persons giving such notice shall be sufficient evidence thereof and shall protect persons acting in good faith in reliance upon such certificate.

DURATION OF THE TRUST

55. Unless sooner terminated as provided in subdivision 56 hereof the trust hereby created shall continue until the expiration of twenty-one (21) years after the death of the last survivor of the following named persons:—

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and upon the expiration of such period the trust shall terminate.

56. The Trustees may with the consent of the Shareholders given in accordance with subdivision 53 hereof terminate the trust hereby created at an earlier date or different time than that limited or prescribed in subdivision 55 hereof.

57. Upon the termination of the trust hereby created whether by limitation of time as provided in subdivision 55 hereof or by action of the Trustees with the consent of the Shareholders as provided in subdivisions 53 and 56 hereof the Trustees shall sell or otherwise dispose of the trust estate for considerations and upon such terms as in their absolute and uncontrolled discretion they shall fix and determine not however inconsistent with the terms and conditions of this agreement. The proceeds of such sale shall be applied as follows:

First. To the payment of all prior costs, charges and expenses;

Second. To the payment of any then existing indebtedness incurred or issued by or on behalf of the Trustees with the written approval of the Trustees;

Third. To the payment of all charges, expenses and liabilities of the Trustees and of the Executive Committee incurred in connection with the administration, management, control and termination of the trust hereby created;

Fourth. The remainder thereof shall be distributed among the Shareholders as provided in subdivision 29 hereof.

In case the trust estate shall be sold and disposed of partly for cash (always provided that there shall be cash sufficient for the purposes hereinabove enumerated in divisions First, Second and Third of this subdivision 57 hereof and partly for securities or other property), the Trustees shall place a valuation upon such securities or other property and shall distribute the same in kind to the Shareholders on the basis set forth in division Fourth of this subdivision 57 it being within the absolute and uncontrolled discretion of the Trustees to determine what part, if any, shall be paid to the holders of the preferred and common shares in cash and what in securities or other property. Any valuation, determination, sale or distribution so made by the Trustees shall be conclusive upon all Shareholders and other persons interested in the trust estate. Any Trus-

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tee or any member of the Executive Committee or any Shareholder may bid for and purchase any property at any sale at public auction or private sale without accountability except for the payment of the purchase price. In making any sale the Trustees shall have the right to sell at public auction or private sale and to buy in at such sale or rescind or vary any contract of sale and to sell without being answerable for loss; and in connection therewith to execute any and all deeds and instruments.

MISCELLANEOUS PROVISIONS

58. The ownership of any share or any security or obligation issued hereunder in accordance with the provisions hereof shall not entitle such owner to any title in or to the trust estate whatsoever or to any right to terminate the trust hereby created or to any right to require any distribution or partition of the trust estate or any part thereof other than in accordance with the terms and provisions hereof.

59. The death of any Trustee or of any holder of any share or security issued hereunder in accordance with the provisions hereof at any time during the continuance of the trust hereby created shall not operate to terminate the said trust and shall not entitle the legal representatives of the deceased Trustee or of such deceased holder to terminate this trust or to require any accounting or distribution or partition of the trust estate or of any part thereof, but the legal representatives or assigns of any deceased holder of any share or other security issued hereunder shall succeed to the rights of such decedent.

60. Nothing in this agreement or in the certificates issued hereunder expressed or implied is intended or shall be construed to give to any person or corporation other than the parties hereto including the Shareholders any legal or equitable right, remedy or claim under or in respect of this agreement or of any covenant, condition or provision therein contained, all its covenants, conditions and provisions being intended to be and being for the sole and exclusive benefit of the parties hereto including the Shareholders.

61. In the construction of the provisions of this agreement and the certificates issued hereunder the word "Trustees" whenever used means the Trustees for the time being,

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whether original or successor, and the word Trustee shall apply to any one of the Trustees whenever the context so admits. Whenever the word "stock" is used herein it shall be deemed to extend to and include voting trust certificates for any such stock.

62. The headings of different parts of these presents and the marginal notes are inserted for convenience of reference and are not to be taken to be any part of these presents or to control or affect the meaning, construction or effect of the same.

63. The Trustees may with the consent of the Shareholders given in accordance with subdivision 53 hereof amend, change or add to these presents and any of the terms and provisions thereof in any manner and to any extent, but no such amendment shall affect the validity or effect of anything previously done by the Trustees or Shareholders hereunder.

64. This instrument is executed by the Trustees and delivered by all the parties hereto in the Commonwealth of Massachusetts and with reference to the laws thereof; and the rights of all parties and the construction and effect of each and every provision hereof shall be determined by the laws of said Commonwealth.

65. This agreement is executed in five counterparts by the parties of the first and second parts, each of which counterparts shall be deemed an original and the acceptance of the certificates issued hereunder shall constitute the Shareholders parties to this agreement with the same force and effect as if they had hereunto signed their names and affixed their seals.

IN WITNESS WHEREOF at the City of Boston in the Commonwealth of Massachusetts the parties of the first and second parts have hereunto subscribed their names and affixed their seals as of the day and year above written.

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.....
.....

Parties of the first part.

.....
.....
.....

Trustees.

J

FORM OF LIMITATION OF LIABILITY IN LEASE

Provided always, and it is hereby declared and agreed, that any claim for debt or damages under the reservations of rent and the covenants on the part of the lessees herein contained or any of them shall be a charge upon and shall be enforceable against the property and effects subject to the trusts of the said indenture at the time of proceedings to enforce the same, but no such claim for debt or damages nor any other claim under the stipulations herein contained shall be enforceable against any trustees or trustee for the time being of said indenture personally, and neither the trustees for the time being nor the shareholders under said indenture of trust shall be held to any personal liability under or by reason of any of the stipulations herein contained. But this provision shall not prevent the lessor from obtaining and enforcing such decree in equity against the trustees for the time being as may be necessary or appropriate to compel the application of the property and effects then in their hands as trustees to the performance of the stipulations of this lease or to prevent the trustees for the time being from violating the stipulations herein contained, and this provision shall not prevent the lessor from maintaining such proceedings as may be necessary or appropriate to obtain possession of the demised premises in case of a violation of the provisions hereof; nor shall this provision otherwise interfere with the force or effect of any of the said covenants or affect any other right or remedy of the lessor in respect of any default in the performance or observance thereof, and this provision shall not exempt any such trustees from personal liability in respect of any trusts herein contained regarding the application of any insurance money or of any moneys paid to them out of damages received for such taking as is hereinbefore mentioned (but so that such personal liability of any trustee shall exist only as to breaches of trust which occur while he is trustee) and, further, that this provision shall not exempt from personal liability any assignee of this lease who shall not be a trustee under said indenture.

K

..... ELECTRIC COMPANIES

FIVE PER CENT FIRST LIEN GOLD BOND

FOR VALUE RECEIVED the Electric Companies will pay to J. S. or bearer One Thousand Dollars in gold coin of the United States of America of the present standard of weight and fineness on the 1st day of June 1925 at the office of the Trust Company in the city of Boston and will also pay interest thereon in like gold coin at the rate of 5 per centum per annum semi-annually on presentation and surrender of the annexed coupons at the time and place therein mentioned.

If the securities pledged for the payment hereof under the indenture hereinafter mentioned shall be sold to enforce the security of the said indenture as therein provided the principal of this bond shall thereupon become due and payable.

This bond is one of a series of bonds of the promisor issued or to be issued for the aggregate principal sum of not exceeding \$1,000,000 under and in pursuance of and all equally secured by a collateral trust indenture dated the 5th day of June 1905 whereby all shares bonds and other securities of street railway corporations and other property now owned or hereafter to be acquired by the Electric Companies are pledged to the Trust Company as Trustee for the security and payment of the said bonds to which indenture reference is hereby made for a statement of the property pledged the nature and extent of the security the rights of the holders of the said bonds in the said security and the terms upon which the said bonds are secured.

This bond is redeemable at par and accrued interest on any interest payment day at the option of the undersigned by giving notice by publication for six successive weeks in a newspaper of general circulation in the city of Boston which notice shall state the time and place of such payment. Interest on this bond shall cease if this bond is not presented for payment in accordance with such notice.

The contract evidenced by this bond binds only the funds

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and property held in trust by the Electric Companies and neither any Trustee or Director of the said companies nor the holder of any of its certificates for shares shall be held to any personal liability under or by reason of any of the provisions hereof such liability if any being expressly waived by the acceptance of this bond.

This bond shall not become obligatory until it shall have been authenticated by the certificate of the Trustee under the said indenture hereon endorsed.

IN WITNESS WHEREOF THE ELECTRIC COMPANIES has caused these presents to be signed in its behalf by the President and Secretary of its Board of Directors duly authorized and the coupons hereto attached to be authenticated by the facsimile signature of its Treasurer as of the 1st day of June 1905.

. ELECTRIC COMPANIES.

By
President.
.
Secretary.

\$25

Coupon

On the 1st day of June 19. . . the Electric Companies will pay to the bearer at the office of the Trust Company in the city of Boston \$25 in gold coin of the United States of the present standard of weight and fineness for six months' interest on its 5 per cent First Lien Gold Bond No. unless such bond shall have been sooner redeemed.

Trustee's Certificate

This bond is one of a series of bonds referred to in the within mentioned indenture between the Electric Companies and the Company as secured thereby.

. TRUST COMPANY, *Trustee*.
By
Secretary.

For value received the undersigned hereby assigns to the within bond and the claim represented thereby without recourse to the undersigned.

(Signed) J. S.

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ARTICLE I

Object of the Club

The Club is established in the City of for the promotion of social intercourse among authors and artists, and other gentlemen connected with or interested in literature and art.

ARTICLE II

Officers

SECTION 1. The officers of the Club shall consist of a President, two Vice-Presidents, a Secretary, a Treasurer, ten Governors, and a Committee on Elections.

The President, Vice-Presidents, Secretary, Treasurer, and Governors shall constitute the Executive Committee.

SECTION 2. The President shall preside at all meetings of the Club and of the Executive Committee. In the absence of the President, or if the office is vacant, one of the Vice-Presidents shall preside; and in the absence of the President and both Vice-Presidents a Chairman shall be chosen by vote.

SECTION 3. The Secretary shall keep a record of the proceedings of the Club, of the Executive Committee, and of the Committee on Elections; shall notify new members of their election; shall issue all notices and conduct all correspondence of the Club, of the Executive Committee, and of the Committee on Elections, except where otherwise provided. If the Secretary is absent from a meeting, a Secretary *pro tempore* shall be chosen by vote. The Secretary shall be exempted from the payment of the annual assessment.

SECTION 4. The Treasurer shall collect and keep all moneys of the Club, and disburse them under the direction of the Executive Committee. He shall keep the accounts of the Club, and shall make a report of its financial condition

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at each annual meeting, and shall send all notices and conduct all correspondence relating to financial matters of the Club. His accounts shall be audited in the manner provided by Section 7 of this Article. He shall be exempted from the payment of the annual assessment, and shall be allowed such sum of money for clerical assistance as the Executive Committee may deem expedient.

At the end of each fiscal year the Treasurer shall report to the Executive Committee the total amount of cash in bank and on hand and accounts receivable less a sum sufficient for the payment of all current bills of the Club. Out of the amount then remaining, if in excess of four thousand dollars, the sum of four thousand dollars shall be reserved towards the running expenses of the succeeding fiscal year, and the balance shall be invested under the direction of the Executive Committee by the Treasurer or such person or persons as the Executive Committee may appoint, in such manner and subject to such terms and conditions as the Executive Committee may determine. The fund shall be known as the Reserve Fund. All income thereof shall be paid to the Treasurer to be applied towards the general expenses of the Club, but no part of the principal of the Fund shall be spent except by a vote of the Club, on the recommendation of the Executive Committee, to be passed at a meeting, notice of which shall be given at least ten days prior thereto, and shall specify the amount and objects of such expenditure. In all matters not herein provided for, the Executive Committee shall have full control and authority over the said Fund, and the securities in which it may be invested.

SECTION 5. The Executive Committee, seven of whom shall constitute a quorum, shall hold the legal title to all the property and moneys of the Club in trust for the members, except that the title to any real estate which may be acquired may be taken and held by trustees appointed for the purpose by the Club. The Executive Committee shall have the management and control of the Club, and may make or authorize all necessary contracts for its administration; but the Executive Committee shall have no authority or power, except by special vote of the Club, to make it liable for any debt beyond the amount of money which may be at the time in the Treasurer's hands and not needed for the discharge of

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existing debts or liabilities. The Executive Committee may make such rules and regulations for the management of the Club and for the use of the club-house, not inconsistent with the Constitution and By-Laws, as it may deem expedient; and it shall appoint from its own number a House Committee of three, and commit thereto the immediate supervision of the club-house, under the direction and control of the Executive Committee. The Executive Committee shall have full power to act in all matters not otherwise provided for in the Constitution or By-Laws.

SECTION 6. The Executive Committee shall appoint from its own number an Art and Library Committee, consisting of five persons, who shall have, under the direction and control of the Executive Committee, the selection and charge of all pictures and other works of art, of exhibitions, of concerts, of lectures, and of all books, periodicals, magazines, and newspapers purchased by or belonging to the Club. The Art and Library Committee may appoint, either from its own number or from the members of the Club, one or more persons to take immediate charge of any of the matters committed to it under the provisions of this section.

SECTION 7. The Executive Committee at its first meeting shall appoint from the Club at large an Auditing Committee of three members, whose duty it shall be to audit the Treasurer's account, either in person or by an expert, and make report thereon to the Executive Committee when so requested.

SECTION 8. All officers of the Club shall be elected by ballot at the annual meeting and shall hold office for one year from the first day of June next ensuing, and until their successors shall have been chosen and shall have accepted office; except the Committee on Elections, which shall hold office for the period hereinafter provided. In case of a vacancy in the office of President or Vice-President, the Executive Committee may call a special meeting of the Club to fill the same. All other vacancies, except such as may occur in the Committee on Elections, shall be filled by the Executive Committee. In case of the absence or disability of the Treasurer or of the Secretary, the Executive Committee shall have the power to appoint a Treasurer *pro tempore* or a Secretary *pro tempore* to serve during such absence or disability.

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ARTICLE III

Elections

SECTION 1. The Committee on Elections, nine of whom shall constitute a quorum, shall consist of sixteen members, of whom the Secretary shall be one. At each annual meeting, five new members shall be chosen for the term of three years, and no person, except the Secretary, having served as a member of said Committee shall be eligible to serve again until the expiration of one year from the end of his last term of office. Any vacancies that may occur in its membership shall be filled by the Committee.

SECTION 2. All elections to membership in the Club shall be made by the Committee on Elections at stated meetings, held for that purpose, either by secret or open ballot as the Committee may determine, and one negative vote in five shall exclude the candidate voted upon.

SECTION 3. Any man of the age of twenty-one years may be proposed for membership in the Club by two members not members of the Committee on Elections, who shall state whether he is proposed as a resident or a non-resident member, and shall certify under their own hands that they know the candidate personally, and believe him a fit person to be a member. The name of the candidate thus proposed shall be posted in one or more prominent places in the clubhouse, with the names of his proposers, the date of posting, and his place of residence if he be a candidate for non-resident membership other than an officer of the United States Army or Navy. No name shall be acted upon until it has been posted at least fourteen days. No elections shall take place in the months of July, August, and September, and not more than ten resident members shall be elected in any calendar month.

SECTION 4. Each candidate elected to membership shall, by a notice sent to his address as given by his proposers, be notified by the Secretary of his election and of the amount of the entrance fee and annual assessment to be paid by him; but he shall not be entitled to any of the privileges of membership until he has paid to the Treasurer the entrance fee and the proportionate part of the annual assessment for the current year, fixed by the By-Laws. If the amount due

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is not paid within sixty days after said notification has been sent, his election may be cancelled by the Executive Committee.

SECTION 5. No candidate rejected by the Committee on Elections shall be proposed again within six months thereafter.

SECTION 6. The number of members of the Club shall not exceed four hundred and fifty resident members, exclusive of the Secretary and Treasurer and those exempted from payment of dues under Article I, Section 4, and Section 7, of the By-Laws, and one hundred non-resident members, exclusive of officers of the United States Army or Navy and those exempted from payment of dues under Article I, Section 4, of the By-Laws. The number of non-resident members who are officers of the United States Army or Navy shall not exceed fifty, exclusive of those who are exempted from payment of dues under Article I, Section 4, of the By-Laws. In case the number of paying members shall by the return of absentees or by the termination of exemption from payment of dues under Article I, Section 4, of the By-Laws be increased above the respective limit of membership in any group by this section prescribed, no new member in that group, the number of members in which has thus been increased above the limit by this section prescribed, shall be chosen until such number shall be reduced, by resignation or otherwise, below such limit.

SECTION 7. Candidates who do not reside or have a usual place of business or study within thirty miles of, and officers of the United States Army or Navy, irrespective of place of residence, may be elected non-resident members of the Club; provided that it is set forth in the proposal nominating the candidate that he is nominated for non-resident membership. Non-resident members, except officers of the United States Army or Navy, shall pay one-half entrance fees. Officers of the Army and Navy shall pay no entrance fee. All non-resident members shall pay one-half of the annual assessment. They shall not be entitled to vote or hold office, but shall have all the other rights and privileges of members, except that in the event of the dissolution of the Club the interest of a non-resident member elected after January 1, 1908, in the property and assets shall be a half share only. Whenever a non-resident mem-

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ber shall cease to belong to that class by residing or having a usual place of business or study within thirty miles of he shall thenceforth be classed as a resident member, shall then pay the *pro rata* balance of the annual assessment for resident members, and thereafter pay the full annual assessment, and shall pay to the Treasurer an amount equal to the difference between his original entrance fee and the entrance fee for resident members at the time of his admission as a non-resident member; and failure to pay said sums shall be considered a failure to pay entrance fees and assessment dues. The Executive Committee may, on the application of any resident member, place him in the class of non-resident members upon being satisfied that he is duly qualified, his privilege to begin on the first day of April next succeeding the date of his application.

ARTICLE IV

Resignation and Forfeiture of Membership

SECTION 1. Any member desiring to resign from the Club shall notify the Secretary in writing of his wish, and the acceptance of his resignation by the Executive Committee shall terminate his membership. No resignation shall exempt from payment of any debt which may be due the Club at the time, unless the Executive Committee deems it right to remit such debt.

SECTION 2. If any member fails to pay any assessment or other debt within two months after the same is due and payable, and if he has been so notified, the Executive Committee may declare his membership forfeited; and in that case the Secretary shall notify him of such action.

SECTION 3. Any three members may present to the Executive Committee written charges signed by themselves impugning the character or conduct of any other member; and if it appears to the Executive Committee on inquiry, after notice to the member so complained of and an opportunity given him to be heard in his defence, that his conduct is deserving of censure or has endangered or is likely to endanger the good order, welfare, or character of the Club, or is a violation of the Constitution, By-Laws, or regulations of the Club, the Committee may, by a vote of a majority of

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all the members thereof, either admonish him, request his resignation, or declare his membership forfeited. A member expelled shall have the right to appeal to the Club within one month after being notified of the action of the Committee; and upon receiving written notice of the appeal, the Executive Committee shall call a special meeting of the Club to be held not more than four weeks from the date of the call, for the purpose of hearing such appeal. If a majority of the members present at such meeting shall on secret ballot reverse the action of this Committee, the person appealing shall be restored to his privileges as a member of the Club; but until such reversal he shall not be entitled to use the club-house or enjoy any other privilege of a member.

SECTION 4. For any misconduct in the club-house or infraction of the Constitution, By-Laws, or regulations of the Club, the proceedings provided for in Section 3 may be begun by the Executive Committee.

SECTION 5. On the resignation or death of a member, or any forfeiture of membership by a member under the Constitution, all his right and interest in the property of the Club shall cease.

ARTICLE V

Meetings

SECTION 1. The annual meeting of the Club shall be held on the last Saturday of April, and special notice thereof shall be sent to all members of the Club. There shall also be meetings for business and social intercourse on the last Saturday of February and of March, and for social intercourse and the reception of strangers at such other times as the Executive Committee may determine; provided that when the last Saturday of any month falls upon a legal holiday, the meeting shall be held upon the Saturday next preceding.

SECTION 2. Special meetings may be called by the Executive Committee, or by the President, and, upon the written request of five members, shall be so called by sending written notice thereof ten days beforehand to each member, and posting a copy of such notice in the club-house.

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SECTION 3. Thirty persons shall constitute a quorum for the transaction of business at any meeting of the Club.

SECTION 4. No stranger shall be present at any meeting during the transaction of business.

ARTICLE VI

Amendments of Constitution and By-Laws, and Notice.

SECTION 1. Amendments of the Constitution and By-Laws must be made at a regular meeting, or at a special meeting called for the purpose; but any such proposed amendment shall be posted in one or more prominent places in the club-house at least ten days before such regular or special meeting. No amendment of the Constitution shall be made except by vote of two-thirds of the members present.

SECTION 2. Unless otherwise provided for, any notice to be given to a member under this Constitution or under the By-Laws shall be deemed sufficient if sent post-paid to the last address given to the Secretary by said member, or in default of such address if left in the letter box in the Club.

BY-LAWS

ARTICLE I

Entrance Fee, Annual Assessment, and Other Indebtedness

SECTION 1. Resident members shall pay an entrance fee of fifty dollars. Non-resident members, except officers of the Army and Navy, shall pay an entrance fee of twenty-five dollars. The annual assessment for all resident members shall be sixty dollars. The annual assessment for all non-resident members shall be thirty dollars. A person joining the Club after the beginning of the fiscal year shall pay the entrance fee and a proportionate part of the assessment for the unexpired part of the current year, reckoning from the first day of the month in which his election occurs.

SECTION 2. The assessment for each year shall be due and payable on the first day of April; but any resident member or any non-resident member who is an officer of the United States Army or Navy may pay one-half of his as-

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assessment on the first day of April, and one-half on the first day of October.

SECTION 3. Members who have not paid their annual assessment or any semi-annual instalment thereof within thirty days after the same shall be due shall be notified of the fact, and that their names will be posted in the clubhouse at the expiration of fifteen days from the date of said notice, if payment has not then been made.

SECTION 4. The Executive Committee may remit the assessment of any member if it thinks it right or expedient so to do.

SECTION 5. On the first day of each month, or as soon thereafter as may be practicable, there shall be sent to each member notice of his indebtedness on the last day of the preceding month; and if the same is not paid on or before the fifteenth day of the month, the name of each member so in default, together with the amount due, shall be posted, and he shall be refused further credit until his indebtedness is discharged.

In case any such indebtedness shall not be discharged before the end of said month, a second notice shall be sent to the member in default, notifying him thereof, and that in case he continues in such default for fifteen days from the end of said month, he shall be excluded from all privileges of the Club until such indebtedness is paid; and such member shall, upon the expiration of such fifteen days, be so excluded, and notice to that effect shall be posted.

SECTION 6. The Executive Committee may at any time limit or suspend the credit of any member.

No further credit shall be given when a member's indebtedness (other than assessment) shall amount to one hundred dollars.

SECTION 7. A resident member intending to be absent from the State for a year or more, and notifying the Secretary in writing to that effect, shall be exempt from the payment of the *pro rata* portion of the dues covering the period of his absence for such year or more, and a non-resident member who is an officer of the United States Army or Navy, receiving orders for duty outside of the State and notifying the Secretary in writing to that effect, shall be exempt from the payment of the *pro rata* portion of the dues covering

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any period of absence for three months or more when outside of the State under such orders, such exemptions to be allowed in such manner as the Executive Committee shall determine.

ARTICLE II

Club-House

SECTION 1. The club-house shall be open for the reception of members every day, under such rules and regulations as the Executive Committee may prescribe.

SECTION 2. No game of any kind shall be played in the club-house between midnight of Saturday and midnight of Sunday.

SECTION 3. Memorandum checks must be signed for all unpaid bills or charges before the member or guest incurring them leaves the club-house; and it shall be the duty of the Superintendent to report any infraction of this rule at once to the Treasurer.

SECTION 4. No member or visitor shall give any money or gratuity to any servant of the Club, and no servant of the Club shall be employed by any member on any business of his own out of the club-house.

SECTION 5. No picture or other work of art shall be placed in the club-house except by consent of the Art and Library Committee.

SECTION 6. No report shall be made or account published of any proceeding of the Club, or of anything which takes place in the club-house, except by special permission of the Executive Committee.

SECTION 7. Any destruction of or injury to the property of the Club or any work of art or curiosity lent to it shall be paid for by the member who shall have caused the same; and the amount to be paid shall be determined by the Executive Committee.

ARTICLE III

Exhibitions

Exhibitions held in the club-house may be open to persons not members of the Club, under such regulations, on such days, and at such hours, as the Art and Library Committee may determine.

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ARTICLE IV

Strangers and Temporary Members

SECTION 1. Persons residing more than thirty miles from and having no place of business therein, may be introduced by members to the club-house for a single day, or to any meeting of the Club, except during the transaction of business, either personally, or by card of introduction; and the Executive Committee, by any of its members, may invite such a person, at the request of any member, to use the club-house for a fortnight. The Executive Committee may, by vote, extend such invitation to any such person for an additional period not exceeding one month; and between any two meetings of the Committee, this power may be exercised by the President, Secretary, or the Chairman of the House Committee.

No member shall be entitled to invitations for more than two persons at the same time; and no person, after the period of his invitation or its extension shall have expired, shall be invited again within three months.

SECTION 2. The Executive Committee may, by vote, extend the hospitality of the Club to distinguished strangers, or persons of eminence, for such period as, in its discretion, it may determine. In the interval between the meetings of the Committee, such an invitation may be issued by the President or Secretary of the Club, upon the written approval of not less than five members of the Executive Committee.

SECTION 3. The Executive Committee shall have power, on the written recommendation of two or more members of the Club, to admit to the use of the Club for such period as the Executive Committee may determine any person eligible to non-resident membership and having a temporary residence or place of business within thirty miles of The privileges thus granted may in any case be terminated at the discretion of the Executive Committee. Any person admitted under this section to the use of the Club for any period shall pay in advance dues for the whole of such period at the rate of five dollars per month. He shall pay no entrance fee, shall have no vote, and in the event of the dissolution of the Club shall have no interest in its property.

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SECTION 4. A person residing in or within thirty miles of or having a place of business therein, may be introduced to the club-house for one day by any member or members, not oftener than once in three months, except to an entertainment in a private room, and to any meeting of the Club, not oftener than once a year.

SECTION 5. A member introducing a person to the club-house, or requesting an invitation for one, shall enter his name at the time in a visitors' book kept for the purpose, with his own name and the date of introduction. Where the person is introduced by card, or the invitation is requested by letter, this entry shall be made by the clerk.

SECTION 6. In case of the violation by any member of any of the preceding sections of this Article, it shall be the duty of the House Committee, upon being informed of such violation, to call the attention of the member to the section violated.

SECTION 7. No visitor or guest shall be permitted to introduce any stranger to the club-house; and the Executive Committee shall have the power to exclude any person, not a member, from the club-house, if it deems it expedient so to do.

SECTION 8. A member introducing or requesting an introduction for any stranger to the club-house shall be personally responsible for all charges and liabilities incurred by him.

ARTICLE V

Nomination of Officers and Annual Report

SECTION 1. At the regular meeting of the Club next preceding the annual meeting, a committee of not less than five shall be appointed to nominate officers for the ensuing year. The names of the persons so nominated shall be posted in the club-house at least ten days before the annual meeting, and the Secretary shall notify members of the Club of such nominations.

Any ten or more members desiring to make a nomination for office may at any time not less than five days before the annual meeting send such nomination in writing signed by them to the Secretary, who shall immediately post the same in the club-house and shall notify members of the

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Club of such nomination, together with the names of the signers. No person not nominated as provided in this section shall be a candidate for office at the annual meeting against a person so nominated.

SECTION 2. At the annual meeting, the Executive Committee shall submit a written report of the condition of the Club and of its proceedings during the previous year, with such facts and suggestions as it may deem it expedient to lay before the Club.

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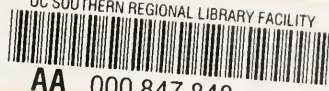
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